PER ASPERA
AD ASTRA
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Pleas & Pleadings

Of the general Nature of Pleadings

Pleadings are the mutual altercations between the Plff & Deft in a suit; put into legal form & sett down in writing, they were formerly presented viva voce, whence in French were called parol. 3 Bl 293

The pleas are now made in the Eng. law formerly in French, afterwards in Latin, in Cromwells time in Eng. after that in Latin again now English as ordaind by stat. 4 Geo. 2 c 26. Laws on P. 25, 29. 3 Bl 317, 324.

Pleas in strictness are nothing more than setting forth such facts as constitute the Plff demand & the Deft defence

Mansfield says, the system of Pl gs is founded in the strongest sense & soundest logic.

The system of Pl is a system of logic, strictly syllogistic, though not always so in form, it is so by implication; & that plea which cannot be reformed, into or does not evolve, a good syllogism is always a bad plea. Every good Dei & Special Plea if not in form is in fact a good syllogism, thus against him who has entered into my field by force, I have by law

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a right to recover: the Deft did enter my field by force, Ergo &c 3 Bl 396

Tis true the Major is not always formally expressed; for the Judges being presumed to know the law, it is unnecessary. Chitty on Pleadg 210

But it is sometimes expressed, as in Pld particular customs, for it is on this custom the party relies, formerly it was the case to express the law in the Decn.

The Minor expresses the facts to which that principle of law contained in the Major is to be applied in this particular case

The Conclusion is the inference from the preceeding propositions (Major & Minor)

The Major is regularly denied by some issue in Law, as by dem^{r} or arrest in Judgement

The Minor by an issue in fact, either a gen^{l} or spec^{l} issue — agen^{l} issue is pleading, not guilty a spec^{l} is pled^{d} some new ground

Ex, Ind^{t} an actions of trespass, if the Deft entered by force into the Pl^{ffs} field the Pl^{ff} had a right to recover, the Defendant did enter by force, Ergo &c to avoid this conclusion the Deft must allledge some new matter by spec^{l} plea as the Pl^{ff} had given him a release, or he entered by right of common. This must be introduced in a spec^{l} plea, which again must be contained in a sylogism.

This sylogistic method must be followed thro. all the variety of pleas

The object is to symplify & facilitate the

administration of justice by bringing the whole cause to depend upon one point

The first stage of a suit is the Writ. This is a monitory letter directed to the sheriff or other proper officer to compell the attendance of the Deft. the suit generally commences from the issuing of the writ. but not so in the Eng. Prac. Dow. 433. 3 Bla 273, 7 SR 4, 2 Burr 960 Cro Jac 11, 3 Burr 1323

In Conn. & many other states of the Union the writ & Dec. issue together, — This is totally unknown in the Eng. Prac. But the suit is here in this state not considered to have commenced at every purpose at the issuing of the writ as in case of Tender of cost of the writ &c.

The cause of action must in all cases exist at the issuing of the writ, so that the suit is then comm^d 4 Root 486,

The first stage of the Plead^g is the Dec^n or Count, the writ is no part of the Ple^d it being an act of the Court. the exposition of the facts or the Dec^n is the act of the Council, Dow. 41, 1 Dn 174. 3 Bl 293, 4 Ba 1, 6

The Count is but an amplification of the writ with the addition of time place & all necessary circumstances 3 Bl 293, 4 Ba 8,

The Ple^a succeeding the Count comprise the allegations the Deft makes in defence & the Pl^ff makes in maintenation of his Dec^n. The first stage after

the Def.ts is the Def.ts Plea. 3 Bl 299, 301, 4 Ba 1, 6 La 81, 2.

The Pleas or Def.ts part are of two kinds 1st Dilatory 2d Pleas to the Actions.

1st Dilatory Pleas tend to delay the suit by questioning the mode in which the remedy is sought, rather than the cause of actions. Their name is derived from their use in Com. law actions of former times being then used for no other cause than delay 3 Bl 301.
Now abolished as to that purpose by stat. 4 & 5 Ann. c 16.

Dilatory Pleas are divided into three kinds, 1st Pleas to the Jurisdiction of the Court. 2d to the disability of the Pl.ff. 3d in Abatement, properly so called.
All Dilatory Pleas are sometimes called Pleas in abatement 3 Bl. 301-2

There is a more minute division of these Dil.y Pl.as but they are in fact only subdivisions of these. for them see. Bac Ab. Pl. 4th, La. Pl. 37.

2d Pleas to the Actions are ans.r to the merits of the cause, Dilatory to the mode in which the act.n is brought Pl.ff & act.n Deny that there is any cause of act.n whatever & tend to defeat it compleatly.

They deny the cause of act.n in three ways. 1st by denying the Pl.ff's allegations. 2d by confessing them true, but avoiding their effect by some new matter 3d by estoppel which neither denies nor confesses, the object is to deny the Pl.ff power of making his allegations. 3 Bl 303 304-6. La 83-8, 115, 130, 140.

Pl. to Act. of two kinds 1st Ye gen. issue. 2d Spl. 5
Plea in bar.

The gen. issue is a plea in bar, tho not always considered so in the loose lang. of Lawyers. Every Plea in Act. is a Plea in bar. 3 Bl 305, 4 Ba 54.

These are the only pleas to the Act., tho the cause of Act. may be denied by Demurrer, which is not a plea, but an excuse for not pleading; It denies not the Plea, but says there is not matter for Act. in point of law in Pl. Dec. & prays the Judgement of the Court (this partakes not the nature of a Plea) 4 Bac 129 130

A Demur. may be taken in opposition to any of the Pleas down to that of Surrebutter. Co Lit. 72 a 5 Mod 132, 4 Ba 129

Rules applying to Pleas & Pleadings in general.

In all Pl. two things are necessary, 1st. that the matter or substance should be sufficient & 2d that it be expressed according to law.

The omission of either of these is cause of Demur. either gen. or spec. Hob. 164, Cow. 693.

It is not in gen. necessary to allege meere matter of law, fact alone is necessary, i.e. facts as they actually exist or as they exist in fiction. See p. 5. to Major

All the Pleader has to allege is the facts or a conclusion from them, from an act of indebtedness he in

a promise to pay, but matter of law need not be alledged
Doug 139. La. 46, 5 Cr R 79

Fact never sufficient to state mere evidence of the fact but the fact itself must be alledged. The law of Plead has nothing to do with the evidence of the fact; and the plea of the evidence is always bad pleading

The promise itself must be alleged except in bills of exchange or promissory notes; — the drawing of which the law considers a promise 1 Lev. 164. Bro. J. 383, 1 Chit. R 196-7, 275, 2 L^d Ray. 1517, Bro. C. 913. Sal 128, L^d Ray 538. Stra. 224, 2 Wils R 63 Notes, 4 Mass R. 451

Wms. J. thinks the alone reason artificial, — but so the fact is

Gen^l Rule. All Plea should be direct, & not argumentative nor by way of recital qualifications afterwards.

It has been determined that these words "pro ea quod, also, because, although &c" are insufficient positive ie. direct. 1 Sm 303. Plowden 128. 4 Ba 22. 97. La 75-6 131, 134. 7 Cr R 458. 1 Saun. 117 notes 1 & 4, La 47 & 69

Gen^l Rule. Each party admits so much of his adversaries allegation as he does not deny, for, he may deny the whole. 4 Ba 2, 73.

" Each parties plea is to be taken most strongly against himself; for each is supposed to make the most of his own case

Ambiguities, construed against the party making them. 1 Sm 303, Hob. 234. Latch 186, Plow 202, 4 Ba. 2.

When any fact of transitable Nature is alle-

it must be laid with time & place. The place for the Jury are taken from the neighbourhood or County the time for the sake of certainty. 3 Bl 294-5, Gil. His. L.R. 70, 83, 84, Com. Dig. Att. Amen. A.1.

(Note) Distinction of laying by way of Venue & by way of local description

Venue is but matter of form and when the place is laid by way of venue, it need not be proved as laid. But when as local-description it is matter of substance and must be proved as laid. Thus -

On a transitory action, he may allege & support an allegn. to have been in the Coun. of A when evidence proves it to be in the Co. of B. Not so in local-description, if an assault & battery is allegd to have been in the house of B, he must prove it so. 2 Ent. 497. 11 Do 226. 4 BR 461

The number, price or quantity of a thing need not be stated precisely.

Except when a mistake in either of these would cause a variance. - - I may sue a Man on an Acn. of Trespass for cutting an hundred trees & recover for only the three he did cut. - - But if I sue him on a Note of $100 & it is proved he gave me one but for $99 I cant recover. - (this last occasions a variance) La 49. -

Surplusage vitiates not the Pleading - case a mans wearing a red-coat is an ass. & batt. agt me.

Repugnancy or self-contradiction does, its fatal Cro. J 377. 549. 618, 4 Co. 42, 1 Jn 303. 2 Ent 333, La. 63 to 65. & 170

It is often laid down in the books that every thing must be pleaded according to its legal effects — This is wrong. But every thing may be so pleaded, & is the most Lawyer like method. Ex. gr. A grant by tenant for life to the Reversioner may be pleaded as a surrender. If a creditor covenants not to sue his debtor, it may be pleaded as a Release. 4 Ba 100, 1 Dn 193 B, 200 B. Cow. 599, 2d Ray 400, 1 Saun. 967 & 11 Mod 1 this last case decisive that the party may plead either way.

That which appears sufficiently on record need not be formally averd, it is sufft. if it is found there thus in suing a man in Act. of Covt. for 100 pd Eagles it is unnecessary to state they are worth $ 500. — 11 Co 25 A 7 Co. 40, 9 Co. 54 A & B, 1 Dn 303, 2 NR. 77, La 48.

Whenever any necessary circumstance is implied in a fact already stated, it need not be alleg.d or averred in form, 1 Dn 303 B.

What is admitted by the parties in Pl.g cannot be contradicted even by the verdict of the jury. / It is their province to decide on what is disputed and on that only. 4 Ba 2, 2 Mod, 5. Bul. N.P. 289.

A gent estate in fee simple may be pleaded gen.ly but in a particular estate as in a term for years, the party must shew the commencement. Reason. A gent estate in fee simple may commence in fraud. A partic.r cannot so com.e having its rise in Conventions

2 Ld Ray 333, 3 Wil 72, Lewes 47.

What are called immaterial averments must often be proved or the parties making them will fail.

Rule. Where a Variance would be the consequence of not proving an immat. avert. it must be proved where not, it is called an impertinent avert. and need not be proved.

Immat. averts which go to the descript. of the thing allgd must be proved, but imp. averts not so. – (Examine cases) 2 Wm. 501, 513, Bul N.P. 5, Esp 521, 2 Bl R. 1004 Doug 640 2 Str. 497, 3 BR 446. 5 Esp. 313. 2 Str 446. La 48.

Case. If it is pled, a debt was pay able in 4 yearly instalments, it need not have been stated, but when stated it must be prov., it is now a pt of the contract & upon the cont the claim is

If the Pleadgs on one side be deficient in mere form as by omitting the necessary circumst of time & place, it is regularly aided by the adverse Party's pleading over, instead of demurring specially, Secus with defect in substance. 7 Co 75 a, 8 Co 120, 1 Inst 303, 4 Ba 2, Sal. 519, 3 Mod 311.

Neither party is obliged to allge any thing more than will amount prima facie to a sufficient cause of Act. No person being obliged to imagine a negative to every possible answer that can be made to his pleading. 2 Wil 100., 2 Burr 1037 1 Saun 299, 2 Ld Ray 400.

If Pleadg on one side expressly avers a material fact on one side which has been omitted by Pleadg on the other the defect is aided. – for it appears upon the whole record that the Pl had a good cause of Act. 1 Sid. 184, 5 Ba 197

Com Dig

Com. Dig. tit. Pl. C. 86 & 87. Esp. 588. Post. 1323, 24.

New matter alledged on either side after Dei^{n} must conclud with a Verification. Reason, The Ver^{n} is the establish'd mode of keeping the Plead^{g} open, so that the other party may reply. / this Rule is founded in the meerest necessity. WG /.

Reason. In every stage of the Pleadg. each party has a right to meet the alleg^{ns} of his adversary, either by denying, confessing & avoiding, or of demurring to them. 3 Bl 309. 1 Saun. 103 Note, 2 Burr. 772, Cow 575, Doug. 598.

Verif^{n} forms Deft right to ans^{r} Dei^{n} by spec^{l} Plea in bar, and this right must be preserved to each party, till a proper issue is tendered. La. 148-9, 150, 158, 3 Bl 317 318, 1 Saun. 103 n1.

Spec^{l} Plea in bar, must conclude with Ver^{n}. Ex^{t} of Plea^{s} of Banc^{o}. the special plea in bar must conclude to the country. but this is an anomally /3, 93./ and nothing to do with us, being merely local La. 115, 145, 224, 227,

Re ans^{r} to Dei^{n} is spec^{l} Plea in bar. to A. P.B. the Replication, to Rep^{n} Rejoinder, to Rej^{n} Surrejoinder, to Surr^{n} Rebutter, to Rebt^{r} Surrebutter, /this is the last Plea the ingenuity of council has ever yet been able to make/. 3 Bl 306. 4 Ba. 6.

In all these successive Pleas^{s}, each party^{s} subseq^{t} pleas^{s} must sostain by his former alleg^{ns}. by ans^{r} or falsify^{s} opponents alleg^{ns} / Sn. 304 A, 3 Bl 310, Plow. 76. 4 Ba 6, Bul N.P. 17.

Judgement is always rendered upon the whole record. Eg. Dat^{r} A Plea in bar, both ill, Judgement must be

rendered for the Defendant. 4 Ba 7, 131, 1 Saun 285, 56, Hob 199 200, 8 Co. 120, 133 b, 9 Co. 110, Sal 173. 11

Of the Declaration
General Rules

The Decl^n being the foundation of the suit it must shew all things essential to the plaintiffs right of act^n

If he omits any material fact he can not recover Hob. 199, Plow 84, 7 Co 24-5, Cro E 925, Cro J 574,

If the Decl^n shews any fact which would not be cause of act^n at the comment of suit, Pl cannot recover

If Judgt should be rendered to the Pltf in such cases it would be erroneous, tho' rend^d after Verdict Doug 61.

Decl^n may be ill on account of some defect or for alleging some fact that is not cause of act^n at the comm^t of the suit. Ex. In Debt on bond — Date of the original before day of payment, 2 Saun. 297, Cro E 925, 7 Co 24-5, Cow 454, 3 Bl 273, 7 TR 4.

The omission of anything that is the gist of the act^n is an incurable defect. — The Gist of an act^n is that without which there is no cause of act^n, Ex. act^n on Contract, omits consideration Grover omits conversion

Where there is such defect the Deft may demur or move an arrest of Judgt^t, for the Pltf can never have Judgt on such ground. 3 Bl 395, 4 TR 472, 2 H Bl 201 Doug 655

Every Decl^n must be certain or contain certainty, i.e. the matter in Decl^n is certain, so that Deft may know what he answers

to answer, 2d that a regular issue may be joind, 3d that the Court may know how to give Judgt. 4th that Defendt may be enabled to plead Judgt in any subsequt. trial, otherwise the Plff might recover twice, 5 Co 34. 4 Burr 2456, 1 Day 315.

This Rule extends to parties, time, place & subject-matter all these must be so described, as to be known in future particular Subject-Matter.

No greater Certainty is required than the nature will conveniently admit of. — consist. part. cases. 1 Sm , Cro E. 785, 97. 5 Co 34-5, 2 Saun 74, Cro E. 817, Cowp 683, 5 Ba 272.

The Sub. Mat. may be described so vaguely as not to lie. as Ex. on agreemt. for taking my property; or an assortment of goods; these are too genl. It has been determind that an acct. for two thirds & nails is sufficient. M'G thinks this wrong, but it is determind for two sheves of corn, oates not sufft. M'G, thinks this ought to be enough; they are not easily reconciled, but must be submitted to dissent & Judgt of Judges.

In matters of Aggravation & Inducement the same degree of certainty is not required, because they are not traversable.

By Inducement is meant matter introductory to the principal subject, but which is necessary to explain or introduce it 2a 66, 70, 118.

By Aggravation is meant that which shews the circumstances of enormity under which the partic. acts complained of were committed these are not of the Gist of the action & cannot be traversed. 2a. 7.

The words "said, aforesaid, aforementioned &c are not sufficiently certain, where there are two antecedent subjects to which they are referable. Ex. having mentioned Counts of A & Co & B. then introduces

Decing the word "aforesaid" it may be referd to one Co. as well as the other.

It is not the Rule, to refer these words to the last mentiond (Co) as is sometimes said to be the case, but use the words & phrases as, "first aforesaid," "last aforesaid &c. 2 Ld Ray 888, 8 Mod 178, 2 Part 66.

A Decln may be ill in part for uncertainty, & good for the remainder. Ex. trover, describing two things 1st well 2d ill, Plff may recover as the former but not as the latter 2 Saun 379, 1 Sal. 218 Com. Dig tit. P.C. 32. 1 Saun. 276 Note.

If one would plead a conveyance or contract, to the validity of which a deed or writing is necessy by C.L. he must not only plead the convce but the deed itself. Ex, conve of land. —

Rule the same where one is to a contract or convce in whatever to C.L. but authorized by S.L. & requd by Stat. 2 to be in writing Ex, case of devise, he must plead the Will attd by three witnesses in plead Release, he must plead Release by deed. 1 Ba 75, 6 Bo. 98-43 B. 2 Wils 376. Sal 519; 12 Mod 540, 4 Ba 656,

Secus. in declaring on contr good at C.L. without writing but requd by Stat. to be written. the writing need not be plead the Stat. have introduced a new rule of evidence only not of plead. 1 Ba 75; 4 Ba 656, 12 Mod. 540, 3 Burr 1890. Doug. 287 Bul N.P. 279. 1 Root. 77. 2 ib. 146. Ex. contr contempl by Stat. of Frauds. —

If however such a contr as the last, is to be pleaded is bad. it must be aver'd to have been written, — for this of more import in bar than otherwise. Rey 450. Bul N.P. 279.

A Plff in Decln upon a Ded is obliged to sett forth no more of it, than is necessy to entitle him to recover, or shews a complete right of action. Reason there may be many distinct covents or stipulns in the same ded, therefore in Decln upon one it is unnecessary

necessary to Def^t upon the whole, unless they all reach his case Doug 642.

A Def^n may be either gen^l or spec^l

General when according to the legal operation of the facts.

Special. if A takes property of B & sells without right. B sues in Indeb. assumpt., Def^n made spec^l by mentioning the kind of prop^y as a horse & chaise, a.c. 4 Ba &. made gen^l by Pl^g prop^y only.

Joinder of Parties in one Declaration

1st Joinder of Plaintiffs.

Persons joind in any legal right, may & regularly ought to join in any act^n for the violation of it — thus two joint-covenantees make a cov^t to A & B jointly, they bring an act^n jointly for its violation upon the elementary prin^le "it is his right who is injured" Def^t not ent^g to one, he pleads the non-joinder in abatement 1 Saun. 153, 5 Co 146, 19a. 1 Sn 164, 2 Leon 12, 5 T.R. 631, 2 Ba 696, 2 Bl 1182.

According to some very late opinions, joint-tenants & co-partners are not obliged to join in all cases but may sue alone, see 12 East 57, 61, 2 Caines 169.

But when a right is in one person alone, he must sue alone — Def^t not liable to a Stranger, he pleads, mis-joinder in abatement. Cro. C. 143, 1 Leon. 315.

In an act^n brought by Executors all the Ex^rs must join & this is the Rule al tho one Ex^r is within age, has not proved the Will, or refused the trust, ~~1 Saun~~ the omiss^n of one is pleaded in abatement 1 Saun 291 g, 9 Co 37, Gelv. 130, Yelv. 3, 1 Vent. 95

If A delivers goods to B to be delivered to C & he does not deliver them, an act^n may be maintained by either A or C, but they can not joind, they have no joint interest, 1 Bulst 67 & 4 Ba 940 Hard 321.

If there are two or more joint obligees or covenantees &c, & one of them dies, his Ex^r or admin^r cannot join in the ac^n, the right of recovery survives at law with the surviving obligee &c. 1 Bos & P 445, 1 Ea 497.

Joinder of Defendants.

Where the cause of ac^n arises out of the joint act or default of two or more, they may be joined as Def^ts, & in case of cont. must be.

Laws. if two join in committing a trespass — so if two join in a malicious prosecution. 4 Ba 10, Hob 6, Latch 262 Bul 5, Here one or all may be sued. These acts are strict torts. Bul. 5, 3 BC 117, - Tort what Bul 5

So if two join in publishing a libel 3 Bur 1985, 2 Bl R 1199.

But two cannot be sued for distinct torts. committed by each severally 4 Ba 10, Stiles 153. — for there being no concert of ac^n there can be no joint act. Ex. If two persons utter & publish the same slanderous words of another, he cannot join them as Defts in an ac^n — no joint act. 4 Ba 10. Palm 313. Bro J 674 Bul 9, 1 Buls 13, Esp 504.

If two or more bind themselves by a joint covenant they must all be joined in the ac^n 3 Ba 697. 2 Vern 99. Sal 393. Laws if joint & several, for then they may be joined, or each may be sued severally

If three bind themselves by a joint & several actions, all or one alone may be sued, but two only cannot. the cont^t must be treated as altogether joint or altogether several. 3 Ba 697. Yelv. 26, 1 Sid 238, 3 Bl R. 1782, 1 Saun. 291. b, in n.

And if two or more bind themselves by one cont^t it is joint of course, unless the terms of it imply a several obligation or duty

Duty. 3 Ba 697, 2 Atk. 31, 8 Init. B. 175. 1 Wil 236, 5 Burr 2611.

If two enter into a joint bond and one die, his Exr is not liable at law to the obligee; he may be sued in Equity; legal remedy is only against the survivor, 1 East 400.

Quere if the bond is jointly & severally.

If an actr is to be brought agt Exrs, those only who have administ must be sued - the others need not be joind. 1 Saun. 291.g. 1 Lev 161. Com. Dig. tit. Abatt E.10. 3 B.R. 597.

Joinder of Causes of Action in one Declaration

Com. Dig. action G.

1st Genl Rule. Several causes of action of the same nature & existing between the same parties may be joind in the same Decln. 4 Ba 11. Comb 254, Kirb 160, Com Dig. actr G.
But they are to be laid in different counts.

By this Rule is meant that if several causes of actr all regd the same Judgt at C.L. they are then of the same Natr - i.e. Capiatur or a Misericordia (Note - explain the diffce between these actns, viz. if Capiatur is adapted to all the various causes of actr, they are of the same natre. Capiatur issues to take the body - Misericordia issues to amerce the party & never sounds in force &c / they may be joind - for they are then of the same nat. within the meaning of the rule. 1 Ba 30, 4 ib 11 - 5 ib 19, Doug 632. 2 Wils 319. Gilb Comr Pr, Went. 366. Ex. debt on bond & on a loan - tho the genl issue is Deft 1 Keble 147, Went 366. Cro. C. 20, 316, 1 BR 276, 1 Wils 252.

But the above Rule is not universally true 1 Wils 252 1 BR 276. - It is a genl Rule

It is universaly true however that if several causes of actn all regr the same Judgt & the same plea i.e. the same genl issue they may be joind, provided the Plf sues in both & the Deft is

sued in both in the same capacity. Ex. Debt on sev[l] bonds - Cov[t] broken on sev[l] Deeds - Assumpt on sev[l] promises 1 Wils 252, 1 T.R. 276.

Whether Ejectment & assault & battery can be joind has been questiond 4 Ba 12. Hob. 249. What is the objection? M[r] G. thinks they . Misnomer in abt applies to all & the gen[l] issue is the same, the objec[n] may be founded on the fiction used in case of ejectt, M[r] G. doubtful how far that will prevail.

So several trespasses viz et armis may be joind, Sev[l] tres[s] on a case: as case agt Sailor for neglect & trover. For the Jud[t] & the Plea are the same, & Co 7. 5. 1 Vent. 223, 2 Bl.R. 884 1 Wils 252, 2 ib. 319. 3 East 70.

So of trover & slander. Doug 692 So of slander & case for malicious prosecution Cow. 230.

So in some cases where the Jud[t] ~~are~~ only are the same tho the pleas are diff[t] according to the gen[l] rule supra. Ex. Debt & Detinue. Debt on bond & Debt on bond. - sup. 4 Bac 11, Cro C 20, 316, 1 Keb. 147. 1 Vent 366.

But causes of act[n] of the same nature accruing to the same person in diff[t] rights, cannot be joind. Ex. one Count in assumpt for money had & received to the use of as Exec[r] & another in his own right, Sal 10. 1 Bac 499, 3 ib. 659, 4 ib 280 2 Stra 1271, 1 Wils 171. Carth 235, Hob. 88. 10 Mod 861, 11 ib. 196 3 Bos & P 7

For ~~D~~ claims in two diff[t] capacities - so that the case is analogous to two several rights of act[n] existing in favour of two distinct persons. This would be a mis-joinder of Counts, & not of causes of act[n] in themselves, which in some other cases might be joind. ~

Causes of acᵗⁿ of diffᵗ Natures i.e. where diffᵗ Judgᵗ are requisite at C.L. can never be joined, thus Trespass & contᵗ can never be joind – Judgt & Plea are both diffᵗ. Sal. 10, 1 Ba 30.

Mar Tres. & Tres. on the case arising ex delicto – semble. For the Judgts are diffᵗ. So case arising ex delicto & contract, for the pleas are diffᵗ 4 Ba 11, 1 Vent 366, Jenk 211, 3 Rep 233, 2 Wils 319, 2 Barr 1114. 2 Leon 194, 1 Sid. 244, Carth 197, 2d Rep 588, 3 Mod. 322, 5 Mod. 90, 1 Rol. 59.

In no case can Cont of any kind be joind with contᵗ. Sal 10, 1 Ba 30, This rule is universal

Nor Debt & account, for tho both are founded on contᵗ & Judgt the same – the Plead & proceedings are diffᵗ 1 Ba 21, 4 Ba 11, 1 Mod 242, Act cant be joind with any thing else.

Abridgement, The distinctions then appear to be these when the Judgts & Genl issue are both the same there may be a joinder – the parties being the same – suing & being sued in the same right – And in some cases there may be when the pleas are diffᵗ, if the Judgts are the same – But both Acontracts can never be joind,

On the other hand – when the Judgts alone are diffᵗ & a fortiori, when the Judgts & pleas are diffᵗ a joinder never is allowed

When the causes of acᵗⁿ are such in their Nature as may be joind, there may still be a misjoinder of Counts. Ex, Count as a promise by administrator to pay money recᵈ by him as such joind with a Count on promise by his intestate – this is a misjoinder for they require diffᵗ Judgts – one de bonis propriis – the other, de bonis intestatis. 4 T.R. 347-8

Joinder of causes in one declaration considered.

The joinder of several causes of action which according to the Rules cant be joind, is cause of demurr. and even of arrest of Judgt thereon — There can be but one final Judgt in one act., & no one Judgt can be applied to all the diffr causes of actn. 4. capiatur & miserecordia Sal 10, Carth 436, 3 Lev 99, 1 Mod 108.

There is a diffr between misjoinder & Duplicity

Misjr. is the joinr diffr causes of actn which cant be joind for they contain distinct rights of recovery

Duplty. is the joinr diffr causes of actn to enforce one entire right of recovery & one only. Ex tort & contract.

But the observed that two causes of actn cant be joind in one actn, viz in Dev for trespass charging Deft. of breaking Plf. house & beating his servants, so that he lost their service, is good, the beating only aggravat. & damages consequential. 4 Ba 12, Carth 113, Stra 48, 202, 2 Wils 313, 3 Wils 20, 8 Mod 292, 1 Mod 155, 2 Mod 167, Sal 642, Esp Dig 407.

To be clear, the claim for loss of service is not in this case considered as a distinct cause of actn, but merely a continuation of original act & merely consequl., therefore there is no misjoinder.

Where several causes of actn are brought by the same party for distinct causes of actn of the same natr the Court will compell the joinr of the whole Ex suit on twelve Notes of hand

This is discretionary with the Court, for the Plf may shew some good cause why they should not be joind. Comb. 244. 2 Stra 1149 1178; 2 Mod 239, 4 Ba 11,

When the Court does compell this joinr the D. P. comp. the Plf to pay costs of application. 2 Mod 239, 1 Chit P 196

In Comm. This diff between Cov. indep[t] in act[r] not sounding in force & coven[ts] in force, is not known

The preserving the diff between joined & misjoin[r] is out of practice in Eng. There is now no capiatur in Eng. but the Act which takes it away, reqr the Plf to pray a fine of 5/ for the suing of it out. 5 Ba 191, to 193,

Miscellaneous Rules

The Decl[n] must agree with the writ, — this a universal rule, for it is the writ that authorizes all the subsequ[t] proceed[s] & tres. & cont[s] coven[ts] in tres. Doct. & Stud. 54, Eno C. 325, Abb 487 4 Ba 12, 13,

When the Plf right of act[r] is to accrue on the perform[ce] of some condition precd[t], he must aver it in Decl[n] the omission of it — is an incurable defect Ex. A sues B on a prom[e] to pay a sum of money — condition A was to build B a house, A must aver he built the house. 7 Co 10, 1 Sk. 645, 1 Saun 319, 320, 1 Sk. 125 — 2 Mod 574, 2 Mod. 246 c. 1 East 202, 208, 619.

But when Plf right of act[r] is qualified on a condition subsequent, he need not notice it. Ex, penal Bonds. It is matter of defence for Deft to plead. 7 Co 10, 1 Sk 638, 1 Mod 254 2 Mod 574, Ecp. Dig. 300,

When they are Reciprocal or independant, covs to or cont[s] — Plf need not aver nor prove performance on his part. Conds, if dependant, he must then aver to[rms]. Ex. 1, Promise by Deft in consideration of Plf having promised. The undertakings are reciprocal 2. In consideration of Plf having promised &c — dependent. Eno J. 645, Abb 487. 1 Vent 177. 1 Powell on Con. 359. 2 Mod 246 & 6, Comb. 265 1 Lev 293

Those facts which constitute the gist or ground of the act must be expressly & positively averd, not by way of recital or inference. Eg. gr. "whereas the Deft on such a day met assd Plff" is not enough it should be "he did beat him". no genl issue could be taken on the former the answer if any, would be "Whereas I did not meet &c" Stra 621, 4 Ba 2, 22 97. 1 Sn 303, 2 Sal 636, 2 Ler 206, 1 Mass R. 96.

By the old Rule, such plea could not be cured even by a verdict, But there are later opinions to the contrary, 2 Mass R 351 1 Wils 99. Esp. Dig. 316. Special demurr. is it ill except on it? It has been determd that "sibiect" videlicet" are enough when not repugnt. Eg. Deft prom. & pay a certn sum sibiect &c 100. 2 Wils 335; 1 Saun 169. 2 Saun 291, Stra 232, 493, Bro J. 619.

In matters of mere Endrsmt & aggravn the Rule does not hold, - they cant be traversed. Pop. 177. Gilb 70

Reason that averts should be direct & positive, is, that a genl ispue may be taken. & so the Rule does not hold as to facts not-traversable by plea, however material they may be, Eg consideration in assumpsit, — passession in trns. — Science in case of mischief done by Defts dog.

Rule does not hold unless that fact can be distinctly put in ispue, 10 Co 77, Hob, 5, 14; Bro C. 116, 4 Co 14b. 1 Saun 169, 170 note 2, Plind assist 10 & onwards.

Dic good in part & ipt ill, thn the whole is demurr. to, Pl may recover upon the good pt. if it contains suff cause of act. Eg two notes of hand, one not due at the time suit is brought, Bro J 104. Hob 178. 10 Co 116, 3 Ray 395, 2 Show, 103, 1 Saun. 248 note, 2 Saun 379.

The last Rule is a Genl Rule & holds when there are

two

two Counts is one Def^r, one good & one ill, Pff recovers upon the one that is good, tho both are comm^d to. Com. Dig. H. C. 82, 286, 225, 23 Gilb C.P. 259. 260, 11 Co 45.

But in the last case, where one Count is good the other ill, if Verd^t is found for Pff with entire damages, Judg^t must be arrested & a venire de novo awarded. for it is considered Jury have found half damages upon the bad Count, the Court is not to enquire whether it is so or not, But 1 Sa 7. 10 Co 30, Doug 695, Lat. 731, 2 Wils. 177, 2 Burr 985, Strau 194, 1271, 1 BR 508, 582, 2 Wils 308, Bro J. 104, Rob 179,

M^r G. Court of errors rejected this general rule of the good & ill Count though he thinks it founded in the highest reason.

If the Jury assess greater damages than the Pff demands, the Pff may release the excess and take Judg^t for the residue. — (this raises a mist of error) 10 Co 115, Carth 19, 21, 5 Ba 195, 272, 2 BR 113 1 Wils 643,

Or the Court to prevent error may ~~give~~ without a release give Judg^t for the residue only 4 Ba 25. But if Judg^t is given for the whole it is error.

If the Pff demands more than by his own shewing he has a right to recover, & the Jury find more, he may release the excess & take Judg^t for the residue, — or if Judg^t is rendered upon the whole it will be erroneous. 1 Rode 283, 1 Saun 282, 245 note 5, 4 Ba 25, 2 BR. 113, Allen 29. Stiles 175, 5 Ba 195, 272.

Pleadings which follow the Declaration

Dilatory Pleas. In Eng. by Stat. 4 & 5 An. no dilatory plea is allowed without affidavit to the truth thereof, & of some matter to induce the court to believe the truth of it. Stat. made because Dil. Pl. were formerly used without foundation in truth merely for delay 3 Bl. 303, 4 Ba 355, 51, 3 Bl 302, 1 Com 2, 3 Wils 51, Tho much Stat. in Con. and no particular inconvenience without it.

1st To the Jurisdiction of the Court. Exceptions thereto are various. Ex. Some privilege, which exempts Dft of liability to the Court, as Att. to an other Ct in the Kingdom). But this exception holds only when he is sued in his own right, he may be sued as Ex. if should his testator have been liable at Stat Ct. Cro C. 5 & 6 Eliz 177, 3 Bl 301,

2 The cause of act. was comit. without the Jurisd. of the Ct - stating of limited Jurisd. 3 Bl 301, Sal 54, 4 Ba 86,

Courts of limited Jurisd. are such as have cogz. of crimes comit. within certain limits — as City-courts.

3 The Court has no Jurisd. of the sub. mat. — but here the plaint is not incap. the proper & effectual), — the proceed. are "coram non judice & void, 10 Co 68, 1 Vent 333, 1 East 352, 4 Ba 86,

4 That the cause of act. arose in foreign country. is decisive in local act., tho of no objection in transitory act. Transit. acts may be brought any where the Dft may be found.

Local actions are 1st When the Jurd. is to the act in rem as in a real act., when execution is to go to deliver possession of land.

2d Criminal actions. A crime cannot be prosecuted except in the

state where it was comitt^d & must be where exhibt in the very county.

8, When the subject is local - as in an act^n of Tres. goods chattels sum pregit.

These are the only cases in which actions are local 4 M^R 508, Stra 640, Cowp, 161, 175, 118, 1 Wils 146, 2 Do 145, Kirb 25.

Upon the last ground of sub. local, in an act^n of Debt or covt for rent, agt an assignee of the lease, the act^n is local — for "rent runs with the land" which has locality

Liens, act^n of Debt & covt agt original lessee does not hold — spirits of covt with the latter not with the former 1. 2 Lord 5087 Carth. 183, 1 Salk 241 B, 786 2 A.

Quia tam, act^n of Burker vs Hughs, tried at Litchf^d Aug^t 27th 1716 on a plea to the jurisdiction of the court.

M^r G. Criminal prosecutions are all local - an act^n on a penal stat. is civil & transitory, — An Indictment upon a penal stat. is criminal & local — The proceedings give it character.

The Distinction is between an act^n & an indictment. the case above was an act^n therefore by M^r G transitory, — contra the decision of the court

The Plea to the Juris^dn of the Court is regul^y put in the order of pleading on the part of Deft.

An exception to the jurisdiction is waived by any other plea than that to the Juris^dn i.e. / if Dont make the exception before the juris^dn / Dyer 137 B, Wils 164, 4 Ba 7, 4 Ba 28, 35

A Plea to the Juris^dn in E.C. is always signd by Deft & must by Att^y Reason artificial, Att^y is an officer of the Court therefore suffered to do it with leave of the Court; & if he asks leave he acknowledges the jurisdiction of the Court. 6 Mod 146, 4 Ba 35,

Where the suit is by writ of ancient demesne there is no possibility of waiving the jurisdiction —

1st Pleas to the Jurisdn conclude to the cognizance of the Court. viz. by praying Jud[t] whether the Ct will have further cogn[z] of the suit. 3 Bl 303 Bath 363. Sal 298; La. 109., 4 Ba 85.

In the P. of Con. when an act[n] is dismiss'd by the Ct on a plea to it's Jurisd[n] the Deft has Jud[t] for costs, when it is dismiss'd & offices he receives none — W[m] thinks this strange — the court have no power & right to judge as to their own Jurisd[n], — if then they decide they have none in this case, they act contra[y] to their decision in awarding costs to Deft.

2d Pleas to the Disability of the Plf.

1st Out lawry deprives a Plf of power to bring an act[n], untill he be pardoned or the out-lawry be removed, — / not known here in this State / 1 Ba 2, 3 Ba 761-2, Lit. Sel. 197.

There are some distinct[ns] relating to out-lawry to be found in the books alone cited. — — but they are of no importance to us, out-lawry not being known

tho an out. La. cannot maintain an act[n] as Plf. still he may be sued; the Law intends to deprive him of a civil privilege, not award him one. 3 Ba 761, Roy 1, 1 Sid. 60,

When a cause of act[n] is forfeited by out lawry, it / the out. La[y] may be pleaded either to the disability, in bar or to the act[n], / 1 Ba 14, 7 Co 2 9- 5 Co 109. La. 88, 104, 3 Ba 761.

2d Excommunication disable a Plf. — thus of no importance to us in the Col. it is only mentioned for order's sake; it exists at C.L. 1 Ba 3, 2 Ba 820, 819. 1 Bac 133-4, 8 Co 63, 96.

3d Alienage. In some cases it is a good Dil[y] Plea, that the Plf is an Alien, — an Alien, tho an alien-friend can maintain real act[n] either real or mixed. Reason, he cannot hold real estate.

Lies, as to personal act[ns] for he can hold pers[l] propt[y]. vide

Cow 171

Cowd. 171, 3 Bl 884, 2 Wils 162, 1 Bl 371-2 Stra. 1253. Kirby 413. two last in this last case. Mg.

The Rule that aliens cant maint^n act^n either real or mixed, has been varied by the local laws of several of the U.S. As in Mg & the NE states Alⁿˢ cant hold real estate except by permiss^n of the Legislature

If a citizen of the U.S. marries an alien, she cant hold dower except by permiss^n of Legislature, — Case of Col. Trumbull. Mg. Legis. 1416.

To ans^r the Ques. who are Alⁿˢ? We must refer to the laws of Eng: & not to the Lis of any particular State.

By Const. U.S. Let. Children of citizens of U.S. tho born abroad, have the rights of Nat. born Cit^n — This contra the C.L.

The Children of Naturalized citiz. if under age at the time of Parents naturalization are entitled to the same rights &c. Stat. U.S. Vol 6. p 79. These Chil. aliens by C.L. 4 Br. 308. 1 Ba. Ab. tit Alⁿˢ A. Dunborough Encyclopedia art. Alien.

Aliens may hold for years the case of a house. Reason, for convenience & encouragement of commerce — this Lease of the house consid^d a chattle 1 Roll 194, 1 Jn 28. 1 Ba tit Alⁿˢ C. Pop 86. 2 Bl 293.

Gen^l Rule an Alⁿ enemy as prisoner of war can maintain no civil actions. — he is entitled to no protection, tho we protect his life. Stra 1312. 1 Ba 83-4, 1 Jn 129. Doug 626, 647, 6 Br 23, 1 Bos & 164.

This Rule not universal, An Alⁿ enemy, can maintain an act^n upon a Ransom bill, by Law of Nations.

Ransom Bill, is a cont^t made at sea, for redemption from captivity & protection for the remaind^r of the voyage.

It has lately been decided that these questions can only be determ^d in the Prize Courts. Doug 619. 625; 3 Burr. 1734, Marsh. Ins 482-3.

By Stat. G III. British Sub. are forbiden to give ransom, (inconsistent with their naval policy) a similar bill was introduced in Congs. 1814-6

An Alⁿ Enᵈ resid. then under a license or who came to this country under Invitation of our Govᵗ may maintⁿ actions. 2 Rep 2882, Sal 46, 1 Ba 4, 84, 3 P.R. 165 Stra 1002 or 1082.

Whether an Alⁿ Enᵈ can sue in a Representative character, viz of Exrᵗ or Adminⁿ is not determined — It must be regulated by the policy of the Nation. Mᵗ G. It is certainly bad policy to let him sue in time of war, in real actⁿ. On the supposition that an Alⁿ Enᵈ cant sue in such representᵉ character, the Court of this Country will appoint an administrator cum testamento annexo. Bac C. 142, 683, 1 Ba 84.

But an Alⁿ Friend as Adminⁿ or Exᵗ can hold leases & all sorts of real propᵗ & maintⁿ actns. But in his own right he cannot Bac. C. 5 & 22 ed. & 1 Ba 84

On a Plea of Alienage the onus probandi lies on the Deftˢ he must prove that Plf is an alien, Plf not obliged to prove his citizenship. 1 Stra 1082, 4 Ba tit P. f. p. 95

4th Plea of disabilityˢ will lie agᵗ all who are attainded of treason or felony, (unpunished) excommunicated, outlawed, monks professed, femes-covert &c — 4 Bl 388, 3 Bl 301, 4 Ba 36, 146, 2 Bl 293.
None of the above except attainder for treason & felony & feme covertures are known in the U.S.

By the Const. U.S. the effect of attainder for treason is limited to the life of the attaind, it descends not to the heirs as by C.L. English it descends to the latest posterity, no fine can be made against none of the heirs of the attaind person. Const. U.S. art. 3. Sec. 3.

6th Coverture. If a feme-covert brings an act alone it may be plead

Plead to her disability, that she is a feme-covert. — But she may bring an act with her husband, this no objection 1 Sa 132 1 Bl 443, 3 BR 631,

The coverture of Plff can be pleaded only at Dil.y, it is no plea to the act or in bar, — In toto long. this is laid down as a Rule in Abat, but it is incert

Gen.l Rule, Whatever may be pleaded as Dil.y Plea cant be plead in any other stage of the act. Carth 124, 3 BR 631, 6 BR 765,

If a feme-sole marries pendente lite, her coverture may be plead to her disability 3 Bl 316, 4 Ba 39, But her husband may join with her & suppl the act.

Lucas, Dr Conn. By Stat. her husband, may appear, suggest the marriage &c. Stat Conn. 477.

6th Infancy. An Infft suing without Guard.n or next friend, can have Infancy plead to his disability. Every an infft has a right to come as Plff in any civil act.n, but he cant appear by Attys, but must appear by Guardian or next Friend. Law supposes the Infft incapable to select a proper Att.y Pow.r of Att.y from an Infft is void. 3 Bl 301, Sal. 296, 1 Sa 135 B. Carth. 129 1 Roll 287.

7th Man in esse. as if an act.n is brought in the name of a person after his death, or in a fictitious name. Com. Dig tit Att.y C 15, 17, Bac. Ab. tit. Att.y L. Chit P 435-6, 1 Wils 302, 1 Bos & P 44.

Pleas to the disability of Plff, confined to the person, viz. by praying Judg.t whether Plff ought to be ans.d 3 Bl 303, Rich R 585 La 109.

3d Pleas in Abatement.

Pleas in Abt. in terms of the Law, mean to destroy, prostrate or demolish the writ. Ex case of Nuisance 1 Sa 134 B. 5 Ba 85.

Pleas Abt ought extend only to the writ, not to the Dec.n or Count mistakes in the Dec.n reach'd by another kind of Pleas. 3 Bl 301 to 303. 1 Ba 15, Sal 298. Carth 172, 3 Lev 351, 354.

It is not universally true that Plea Abt waives the writ only & not the Decr — but Pleas Abt universally waive the writ.

Misnomer in Decr is waived by Pleas Abt — If Writ & Decr disagree want of addition, Plea Abt correct. writ on bail date in writ Sept 1st, in Decr Nov 1st. 1 Bos & P 647, 3 Bl. 361, 4 Ba 830, 5 Mod 132, 144, La 105.

In Com. the writ consists of that pt of the record which precedes the statemt of the cause of acn — Writ & Decr ajoyne together — Writ concludes with " and in Plea of debt, or thes." — Decr commences with "Whereupon the Plff complains". — The cause of acn being com to both writ & Decr they really constitute but one instrument.

In a Plea Abt the greatest accuracy is req^d, — the least inaccuracy is fatal

In Terms of the Law, certainty to a certain extent in every particular is req^d in Pl Abt. Com Dig Abt, G11, 3 BR 1855, 5 BR 497, La 55 56, 134, 107, 8 BR 167. 2 Bl 580.

Causes of Abatement, are either intrinsic, or extrinsic, i.e. they may appear on the face of the writ, or may not then appear. Ex. a want of addition Ext^c — misnomer, Ext^c —

Misnomer is when a man is sued by a wrong name, as John Stiles instead of Thos Stiles.

Misnomer of Deft is good cause of Abt. whether the mistake is in the writ or Decr 3 Ba 624, Sal 7, 3 Bl 302, 3 East 167.

The want of addition of Deft, is good cause of Abt.

Addition is the Defts title, dignity, state, trade or degree or place of abode. Ex. John Stiles Knight, 3d Ex^t. of such a place

This addition is required by Stat. 1 Hen. 5, for the sake of certainty

— [two persons may have the same name] — La 106, 3 Bl 302, 3 Ba 617, 6 Mod Carth 14.

Omission of the descrip[n] call'd Add[n] good cause of Abt.
A man may be described by his degree or his mystery, either is sufficient his present or his late place of abode. — La 106.

This Rule relates to an[r] Person, appeals, & indictments ~~has~~ & not to an[r] Deed — Stat 1 Hen 5, does not apply to ans real, because the Possn sufficiently identifies the Party — If two persons may be of the same town it is [x time] improbable, that the two should possess the same field described in Deed. 3 Ba 618. 6 Mod 85.

By C.L, neither the want of add[n] or misns. was suff[t] cause of Abt on an indict[t] for felony. — Reason, the prisoner is present, therefore sufficiently identified. — But Stat 1 Hen 5, reg[s] the add[n] in this case, — 4 Ba 38, Sid 40, Cro C 114, Hawk. 243

If Pris[r] in this case pleads Abt, it is useless, he will be returnd. 1 Hawk, 243, 2 Hawk, 176, 238.

As a ~~Defect~~ want of add[n] is a Defect in the Writ, so is a mistake in the add[n]. A may be pleadd in Abt. Ex, J. S. Knight instead of Esq[r] 3 Bl 302, Comb 63, 2 Ld Ray 1014.

In Comn, these distinctns unnecessy, nothing is necessy but the place of abode.

But when one is sued in his Official Capacity, the add[n] is necessy — His civil character is the Inducement to an[n] and without this ~~Case~~ he would not be liable. Ex, One liable as heir to a certain estate, he must be described as such — This not necessy by way of add[n] but to make out the complete cause of an[n]. 3 Ba 620, 2 Vent 94. Carth 301. 302,

If a Deft is sued in wrong addn of this kind, it is more matter of pleading, & a mistake in it does not vitiate the Writ. If J.S. Esq^r heir of R.S. Esq^r is a mere impertinent averm^t. A is in fact J.S. is not the heir of R.S. it does not injury — ~~2 Ba 626, 4 Ba 38, Lut 96~~ 3 Ba 621 Cro C. 333.

If there is a mistake in one of two Deffts, It cannot be pleaded by his Co-Deft. tho it can by himself. & If A is misnamed it is of no consequ^ce to B, unless it will cause a nonsuit. 3 Ba 626, 4 Ba 38. Lut 96

In the suppos^n that one of two Deffts be misnamed, & he pleads Abt. Wm G is uncertain, whether the Writ will abate in toto, or only to the misnamed alone; Weight of opinion, is that it does not. Carth 96, & Co 159 b — 3 Bac 625, 4 Ba 45.

Wm G.s Criterion, When two are joind as Deffts who might have been sued seperately, he thinks it would not abate in toto, Sic us if they were obliged to join.

Abt Q.L. the want of addn of no effect, unless the Deft dignifie it was as high as a Knight. — Same rule as to Plff.

This Rule is founded on the idea that the dignity, is part of the name; "Sir J.F and his Knight would stick to him" 3 Ba 617. Comb 189 Sal 561.

A Deft who pleads misnomer, or want of addn, must give the Plff a better writ, as the law calls it i.e. he must set forth on record, what his right name or addn is — This Rule as to Pl Abt. is gen^l. 3 Ba ~~624~~. 624. 8 Mo 515. Wills 554. 2 Ld Ray 1178. 1 Com Dig tit Abt. (I 12), La 39, 103-4.

The Effect of this Rule is that the Plff may be enabled to avoid a future mistake of the same kind, — The Law permits this advantage of Deft but once.

In the Deffts Plea where he takes such exceptions he must not only allidge that it is not his name by which he is sued — & what his right name is — but must allidge that he was ~~and~~ known or call'd at the time specified by the name in the Writ. Sal 547. 2 Ray 118, 3 Ba 624 4 Mod. 374. Wills 544. this good law. 2 Ray 118, 249.

If the Deft admits himself to be the person named, or admits himself to be rightly named by leaving his Plea with "& s^d AB comes into Court, to defend &c. — his Plea Alt will avail nothing. — If he does not admit it, he begins with & J.S. against whom the writ is prayd out by the name of AB. &c. Ha 92. 1 Show 394. Carth 307. Comb 118. 2 Saun 209 B., 5 DR 487.

Misnomer Quere of add^n as such is to be taken advantage of only by Plea D in Abt — mainly to plead to the act^n — Or Deft must assign for error as a gend Rule, what he might have plead^d in Abt. 1 Roll 750, Carth 124, Sal 2, 2 Ba 151 6 Bac 4, 2 WBR 297, 299, Comb 184.

If the Recognizance of Bail is taken out for him by the name by which he is sued — tho he is not party to the recog^ce Plea Abt no avail — It is an admission he is sued in his own name. — 2 WR 458, Wills 467, Sal 5.

If one executes a Speciality by a wrong name, it is said he must be sued by that name, the right name being introduced under an alias.

M^cG thinks this not correct. — But should be sued under his right name, averring that he executed under a wrong name & diff^t one &c" M^cG has done this himself & thinks it the best way. Stra 1218, 3 Ba 619, 616, 1 Bul 215, Dyer 273.

If the Christian Name is mistaken in Writing or in instr^t Co Lit says it is fatal, true name cant be inserted under an alias, Ex. J Stiles alias & Stiles

M^cG "this is an extraordinary rule, that the sir-name when mistaken can be introduced under an alias but the Christian can not, Rule not known in this country, & probably never will" It is founded on Lit^l Co. ideas of the Christ. baptism. 1 Inst 3, 4 Co 43, as Copied from him, Wills 554, Stra 1218, 3 East 111, 8 Mod 440, Stra 513.

When there are several Defts the writ should describe them all by their proper names, — Name of the firm not sufft. it is not certain, Firm of A B & Co, may contain A B C D E. & indeed the Co^s name frequently designates no one of the firm, 8 DR 405, Leach. Cas. 240

Same with Corporations, for the Members of Corporations are unk^n

are unknown in Law. &c. Suit agst Phenix Bank. Lewis 244

For the Safety of Defft it is unnecessy for him to take advantage of misnomer of addn — for if suit should be determined agst him by a wrong name, & then he should be sued again upon the right name, he may plead the former suit in bar. 3 Ba 625, Stra 1218. 4 Ba 38.

Misnomer of Plff may be plead in Abt. but opportunity not often happens.

But a Replication in this case alledging that Plff was call'd & known at the time specified, as well by the name by which he is sued as the other, is enough to defeat the Abat. 1 East 542, 1 Com. Dig. Abat.

A wrong addn is Discrip" of Plff is no cause of Abat. unless, at C.L. his dignity is as high that of Knight — Reason — there is no danger of mistake — Plff prays out the writ, Stat 1 Hen 5 does not extend Plff on the misn. [a] see p 21 A

It has been doubted in Comn. that a mistake in Plff's place of abode is cause of Abat. — residence of Plff may affect Juris" of the Court. — Doubt took its rise, from an Affe ming in the name of Att alexandria to party to Plff unknown.

2d Coverture of Defft cause of Abatement. — Reason clear 1 An 132 1 Sid 140, 4 Ba 39.

But if feme-sole marries pendente lite it is Error — the rent plead in Abat. an act of her own free will, 1 Ba 9, 10, Cro J 322 Stra 511, 2 Roy 1525,

If a feme-covert would avail herself of the privilege she can plead it only in Abat. not in bar. — She admits herself rightly sued by not plead'g Abat. — 29, 39, Latch 24, Lut 22, 23, 1178.

On this Rule books are contradictory, & some books within a few pages contradict themselves

True Rule is, She must plead her coverture in Abate if she pleads it at all. But her husband may appear & plead it in bar. And if Judgt is rendered agst her, he & she together may take a writ of error, 4 Ba, 9, 10, 39, Stiles 254, Sal 400, 3 SR 631, 5 SR, 691.

The writ of error being brought for an extrinsic error is brought coram vobis eos vobis - i.e. before the same Court - for the error was not a mistake of the Judges. 3 Esp R. 16, & 19 Margin. Imp. 295

If two persons not married are sued together as Hus. & Wife, the joint may be Plead in Abat. 2a 105.

Infancy of Deft is not cause of Abat. even if Infant is sued without Guardian, for the Court will upon notice allow time to summon his Guard, or will appoint one ad litem if he has none, 1 Sm & G, 135 4 Ba 149, 150, 5 Co 33b, 3 Bl 427

In Comm. if a person under a Conservator is sued without his Cons., it is no cause of Abat. but time is allow'd by the Court on notice to summon the Cons. - do. with Guardian. Kirby 174.

3d Death of the Parties

1st At C.L. if a sole Plff or sole Deft Died pen. lite it Abat. of course. 1 Ba 7, 10 Co 134, 1 Sm 139, Cro E 982.

So at C.L. if one of several Plffs died pen. lite it Abat. except in personal act. in case of summons & severance - for he goes for his original part only. - 1 Ba 7, 8, 10 Co 134, 6 Co 26, Reas. is in Co. Dr. Pl. placitandi Introduction 3 & 4,

But if one of several Defts died, it is generaly at C.L. that the suit does not Abate, - process was issued for Plff to enter or suggest upon record the death of one Deft, & then proceed agt the rest. 1 Ba 8, 4 Ba 42 1 Show 183, 3 Mod 249.

But if Plff should neglect to suggest upon record the death of one deft. & could obtain Judgt agt the whole of original Defts. the Judgt would be erroneous in toto, & writ of error may be brought. Carth 149.

By Eng. Stat. 17 Charles 2, & 8 & 9 of Wm 3d & similar ones of our own the Inconveniences of Abt. by death of parties is remedied. -

Under these Stat. where there are several Plffs or Defts. & one dies pen. lite the suit does not abate if the cause of act. is such that it will survive

vive to the survivors, & if one of Defts dies, it does not abate the cause of actⁿ which would survive against the survivors. — & this is almost universally the case.

In either of these cases the death being suggested upon record, the suit may proceed, 4 Ba 42, 2 Mod 115 Stat Comm. 22. 23,

2ᵈ If sole Plf. dies pen. lite, in which the right of actⁿ would survive to his Repⁿᵗᶦᵛᵉˢ as Exᵒʳ or Admᵒʳ, writ does not abate, in Con.

If sole Deft dies pen. lite, & cause of actⁿ survt. agt his Representᵗᶦᵛᵉˢ writ does not abate in Con, — so in Eng. & at C.L. if the death happen after an interlocutory Judgt. has been rendered, 4 Ba. 42

When sole Plf dies & the right of actⁿ surv. his Exᵒʳ enters & prosecutes merely on suggesting the death upon the record.

Seems, if Deft dies, for Plf must then take out a scire facias agt Exᵒʳˢ of Deft requiring them to shew cause why Judgt should not be rendered agt them. Stat Con 22, 3, 4, 4 Ba 42.

Stat. Con. relates to actⁿ only before Supʳ & County Courts, but it is extended by construction to suits before single Justices of Justices

On the supposition that there were two Plfs & both died pen. lite tho the Law does not provide for the case. McG. thinks, that after the death of the first, the actⁿ survives to the other Plf. When he dies the action survives to his Exᵒʳˢ &c, & not at all to the first deceased Plf Exᵒʳˢ, — for after death of the first, the other became sole Plf.

Real Actions in most case shall abate on the death of the sole Plf. for none of the Stat quoted provide for such a case. — For the Stat. that keeps alive actⁿˢ in favor or agt Exᵒʳˢ &c do not affect real rights, but real actⁿˢ brought by surv. Plf or agt surv. Defts are within the Stats on this subject, 1 Ba 7 to 9, Cro C. 892, 1 Dan 139, Stat Con 22, 23.

Decided by Stat Con. in 1800, that Petitions for new trials are within and Stat on this sub. — tho the Stat was passed before such petitions were known, & that on respondents death sur. pa. lies agt his exᵒʳˢ as in actⁿˢ Dey, Griswold vs Hoover, 1 Ct Rep. — Sept 1800 Judgt affirmed in Ct Errors June 1803

4th Variance. Thus if Decr varies from the Writ, the Vare may be plead in Abat. — ex. Writ sounding in Debt. Decr in contract. Yelv 5, 1 Wils 249, 4 Ba & Ald 43-4

If the Var. is in form only, plea in Abat. is necessy to take advantage of it. But if Var. is in Substce it is unnecessary the proper. — Judgt may be arrested, or the Court will dismiss the suit ex officio. — This does not hold in Mod. C.P., for the Ct will not now grant oyer of the writ. Yelv 120, pt of form, Latch 179, Hob 279, pt of substce Cro E 722, 121, 185, 196, 2 Wils 294, mod. Rule. 4 Mod, 246 La 97, Sal 658, 701.

A Var. between the Instt sued upon & the description of it in the writ is cause of Abat. — or if it is mis-described. ex. misdate of land, 10 Co 14 2 Wils 232, 4 BR 314, Com Dig Abt C12, 1 Bos & P 87.

If the Var. be between the Instt. sued upon & subscrip. is Decr, the usual mode in the C.P. is to take advant. of it in evidence under the gen issue ex. Land described as having date Sept 1. the Instt produced having date Nov 1st — Defft contends the Instt. does not supt Decr — In C.P. this usually works a non-suit. 1 Saun 154 note, Plow 84, Doug 640, 1 Bos & P 7, 1 BR 655 — 4 BR 612, 687-8, Com 765-7.

In Com. advant. can be taken of such Var as in Eng. but it is usually done by Plea in Abat. — this puts an earlier end to the suit — therefor the best method — this may be done in Eng. Com Dig Abt G11, Abat G1, Sal 669. Doctr. plaint in Dyet of Pleas 1,

Four ways of taking advant. of this kind of Var. 1st By Plea in Abat. 2d In evidence under the gen issue, 3d By objecting to the admission of it in evid. 4th By writ of it upon record, & then demurr to it on the Decr. Quere — how demur to it when on the Decr ehrs. When writ on record, it becomes part of the Decr — and the Ct will then give him oyer. ex. If declares on a bond executed by Defft Sept 1st & it in fact was Sept 2d. Cot Ass — Saun 318. Com. Dig. Pl. C 23, Hob 18, La 51, 99. 2 Wils 339, 2 Stra 1146, Bull NP 218,

It was Dict in Com. about 40 years since, that this demurr upon writt instrument, should be to the evidence & not to the Decr

M C J.

Mr G. "Fact" is not laid — Demurr to evidence cant take place except to as an issue in fact. Kirby 108 — 7

Misnomer of a party, if it works a Var must be taken advant. of under the Genl issue

This Rule is not opposed to it in no way interferes with the one laid down before that a "Misnomer can be taken advant. of only by Pl Abat."
Ex. Pff Def upon a bond of Defft whom he calls B — he pleads it, it is signd A. — advant. is here taken not as a Miss, but as a variance under the Genl Issue — it does not suppt Demr, 4 TR 618

5th Non Joinder and misjoinder of Parties

1st Of Plaintiffs.

Genl Rule. If one person sues alone when several ought to be joined the nonjoinder of the other or others is good cause of Abatement. Ex. A v B hold a note & A sues it alone the nonjoinder of B may be plead in Abt. And this Rule is universal. 1 Anst 164a 189a 195b 198a Sal 4, 7 TR 243, 1 Saun 291b,

Rule is the same if two or more joind in a suit whe the right of act is in one only. Ex Debt is due A & he joins B with him in the suit. The misjoinder as this is called is cause of Abt. the former was nonjoinder. Cro C 143 Hob 72 1 Rolle 294, 1 Leon 315.

But when the objection arising upon the nonjoinder or misjoinder goes to defeat the Demr, the advantage of it may be taken as well under the Genl Issue as under the Plea in Abt. Ex. In an act on Contract one Pff sues alone when another ought to be joind, the advantage may be taken under the genl issue, — for the nonjoinder goes in opposition to the Demr — he never made the contract not to A but to A & B. —

On the other hand if two or more sue when the right of act is in one, the advantage may be taken under the genl issue. — he made the contract to A not to A & B. —

If the other covenantees had not sealed the covent, or were dead it should be amend, & this will aid the writ.

Non Joinder & mis Joinder

It is a consequence of the two Rules that in an act on contract advantage may be taken of the misjoinder & nonjoinder under the gent issue 1 B&P 75; 2 Strau 820, 2 BR 2852 Backs Ed. 215.

If the act in either of these cases is brought upon a written instrument. the Deft may crave oyer of the Instr, write it upon record, & then demur to it, (1 Saun 153, 291 n. 4 g, 1 B&P 67.

Observe that when the act is on a contract, the right of act vesting in one & the Dec declares it to be in two, the fact denies the Dec — the contt proved is not the contt declared upon, — & the advantage may be taken of it either under the Gen issue or by plea in Abt.

Once again. If on Contt one sues alone when the right of act vests in two or more & this appears on the Decn the mistake is fatal upon the record, & is not aided even by a verdict. the verdict is removed by a writ of error, arrest of judgment. Vi. 5 Co 118 c. Esp Dig 304, 2 Stra 1146, 1 Saun 153, 291, 1 B&P 67.

Rule the same If two sue when on the Dec it appears that the right of act is in one — neither Abt. gen issue, or demurrer can be pleaded, for the error is on record.

But in an action sounding in tort. If one Plf. sue alone when the right of act is in two or more, the advantage can be taken only by a Plea in Abat. Ex Act of Tres. quare clausum fregit. the Tres was on the land of A & B & not on As alone who sues. therefore the gent issue can't be plead. for he did enter on As land — as he did on Bs. — the error does not deny the Dec Salk 32. 6 BR 795, 1 Saun 291 g h 2 Strau 820, 1116, 5 Co 118 b 3 BR. 649. (These rules it will be observed are all dependant on fixed Princ.) 4 Co 159, Strau 420, 5 East 407.

It is a material Rule in Plead. that if one sues in tort when two or more ought to be joind. the Deft may give in evidence

Non Joinder & Mis Joinder
Alatement

under the gen issue the interest of the other party for the purpose of taking off a moiety of the damages. Ex. A & B are joint owners of a horse, & J.S. takes him away. if A brings the suit J.S. may give in evidence under the gen issue, the right of B, so that A shall recover no more than his share of the animal. the advantage should be taken by Plea in Abat. 1 East 407 Peeks R. 205.

On the other hand. If two sue in tort when the right of act is in one, the advantage is taken under the gen issue Ex. A owns goods which J.S. takes away. — A joins B with him in an act. It shall the gen issue, for the facts do not sup. port the Decl., but does the gen issue. 5 Ba & Ad, Cro C 143. Misjoinders always support the Gen issue. Nonjoinders do not.

If one part owner of Chattle sues alone in tort & the Deft does not plead the nonjoinder in Alatement, the other pt owner may sue again for his share of the damages — which shews the propriety of permitting Deft to plead the nonjoinder 7 Co R 27, 1 Esp 116, 2 Esp 585, 622

Nonjoinder & Misjoinder of Defts

If one of two partners or joint Debtors is sued alone on Contract the nonj must be plead in Abat. or it is waived unless it appears on the Decl there is another party living who ought to be joind — in which case it is evident the error is radical

Gen Rule is that the Debtor who is sued ought to plead the nonjoinder in Alat. —

But if it appear on the Decl that there is another party living who ought to be joind there is no need of the Plea in Alat. for advantage may be taken either by a writ in error arrest of Judgt &c. 5 Burr 2611, 2 Bl. Rep. 947, 5 Co R 61, 2 Ch R 365, 1 Saun 291 b note 4, 1 Atk 235 Cowper 732. one case

Abatement. non Ass. contra Salk 440 but this is not Law.

As to a case arising "ex quasi contractu", it was formerly said the Rule was the same. Secus now. Now advantage can not be taken even by Plea in Abat.

By a case "ex quasi contractu" is meant a case sounding in tort, but resulting from a breach of contract. Ex. gr. Bailment, the ops arising from negligence or fraud. — the charging neglect or fraud, is charging tort. In this case as the rule now is advantage can be taken neither by Plea in Abat. or any other plea. Authorities to both points 1st to the old Rule 1 Saun 291 d in notes. Carth 62-3, 6 TR 369. 2 BR 365. 5 Ba 192 185. New Rule. 3 East 62. 69. 70, 5 TR 649, 651. —

If one of two persons is sued on cont when the other ought to be joind, the non joinder can be pleaded in Abat. but the Defft cant in that case plead it under the gen issue. A & B make a bond together. to this A cant plead non est factum, for it was his bond, ~~& so it was B's bond~~. but not his sole bond. 1 Burr 283 a 5 Co 119, 2 Bl. R, 950, 1 B & B 72, 1 Vent 34. the omission to plead in Abat waives the objection.

Where the suit is thus defeated & a new suit is brought with another party added in the writ, the new Defft thus added may plead in Abat the non joinder of a third person who should have been joind. & so on. But he that pleaded the non join of the first cannot plead that of the second — for he has had his opportunity of plead & his Abat. therefore he is concluded 3 East 70.

Gen Rule is, that when one of two parties is sued he must plead in Abat. But when it appears from the plead gs of Plf that there is another person living who ought to

Abat. Non-join &c. If joint there is no need of Plead. the Abat for the error is on record. It is disposed of accordingly 5 Burr 2614 2 Ba 598. 1 Saun 291 n b &c, 9 Co 52 b, 6 Mo R 769.

The same gen. Rule & Distinctions apply to cases where two ~~out of~~ three or more obligors joint & several are sued without the next advantage lies in the Plea in Abat.

If one of several joint & several obligors is sued alone there is no ~~remedy~~ advantage except in Abat 1 Saun 291 b.

On the other hand If two persons are sued on cont when one alone ought to have been sued there is no need of plead. the Abat. for advantage may be taken of the mis. under the Gen. Issue. Ex. An act. ags. A & B on a bond executed by A alone. The Plea may be non est factum & the proof is A alone promised not A & B. In case of this Abat never need be plead. 1 East 498, 2 M R 454, 2 Day 278.

In this case of two being sued when one alone was liable should the jury find a verdict agt the one who was liable & for the other. Judgt might be arrested by the agt whom the verdict was found — for the evidence disproved the Decl. Carth 261, 3 East 62. And in this case Deft cant cure his act by entering his not. pros. he must recog. secundum allegatum or not at all 5 Esp 47.

If two persons are sued for a tort committed by one, he who is not guilty cant plead the Abat. & in this case it is the duty of the Jury to find according to proof agt the Criminal — for torts are both joint & several 1 Stra 993, 509, 2 Co 159, 1 Stra 420 5 M R 649. 3 East 62, 1 Saun 291 b

On the other hand if one is sued alone when the tort is committed by two or more the non. cant be plead. in Abat.

If in tort then you sue two when one only is guilty, or one when two are guilty, it is no injury to the Pleas

Abat. Nonjoinder 33

Exception to this last Rule. When the action is concerning real prop. held by the person sued & another in joint tenure, the nonj or misj is cause of Abat. Thus if A & B are joint-tents of land A bound to keep up a bridge or the like. — they both must be joind in the act — for their liability arises from their joint-tenure — But in all other cases of tort. Pl may sue any one even out of ten tortious persons, whom he should choose to select. 5 Bac 651, 1 Saun 291 e, 2 Bl 182, Com Dig Abat I 6.

The Grand Rule of Distinctions when to plead the nonj or misjoinder in Abat. Is this. When the objection arising from the nonj or misj. denies the Deed or supports the gene issue. Abat need not be pleaded. But when the objection does not deny the Deed or support the gene issue Abat must be pleaded.

6th Pendency of a Prior Suit between the same Parties for the same cause is cause of Abat. This is on the maxim, that the Law abhors a multiplicity of suits. It is founded on the policy of preventing Pls harrassing Defts. 1 Ba 13, 4 Ba 48.

But to abate a suit on this ground both must be of the same kind or concurrent in their nature, & the cause of act must be of the same kind, but if of diff kinds Pl may maintain as many acts as he has diff causes. Q. It is cause of Abat. that Pl sues for this & more on the same cause of act. Now there are concurrent & the acts are specifically diff. — the one is plead in Abat. of the other 6 Bac Abr 144, 4 Co 43 a.

But the Rule does not hold, Unless the acts are for the same cause, the same sub. mat. Tho' there may two suits pending for the same time for the same transaction, but they must have diff objects. Q case on a Mortgage. One suit for the equity of Redemp. the other for Waste.

Abate m. Prior Suit

To abate a suit on this ground it is unnecessary that the prior suit be actually pending at the time of pleading the Abate - the suit if it was pend. at the time of the comm. of the second suit — because the second was at intro vexatious. Doct. Pl. 10, 4 Ba 487

A suit is consid. as pend. from the issuing of the writ — this ques. may arise on this plea Cro J 11, 5 Co 28. Cowp 452, 3 Burr. 1429.

But if upon such plea of Abat. the Plff can shew that the former suit would have been wholy ineffectual, the Abat would not prevail — for there was nothing vexatious in the second suit

If the first act was plainly misconceived the pendency of it would not Abate the second — same reason. Thus A brings an act of Pes. when Trover should have been brought. This would not lie, he then brings Trover. The Plea of the prior suit will not prevail in Abat. 1 Root 365, 462

Mr G supposes the Rule in spirit extends only to those suits which were unnecessary.

In Com. in an act on Book Debt the Deft may sue Plff in another act on book Debt - so that the Deft need not plead the sett off, but comence a counter act.

This Plea it seems is good tho there be another Deft joind in the 2d suit. If A sues B, then while this is pend. comm. another act by A & B, B can plead the 1st in Abat. Hob 137. Carth 96-7, 1 Ba 13, 14, 1 Show 71. But this pt is unsettled.

Rule the same when one of the Defts of the prior act is omitted in the 2d. Carth 96-7, Hob 137. 4 Ba 49. 1 Ba 13.

If a subsequent act is comenced on the same day of the Abat of the former suit, the writ is supposed to have issued after the first was abated. Whether this can be rebutted or not

Abatement. Prior Suit } by evidence is not settled. Gibb. C.P. 26 d. Allen 34, 1 Ba 14

is pend But it is no cause of Abat. in any case that a prior act is pending agt a Stranger for suppose an this. to have been committed by two. & Plff sues first A & then B with Dicont plead the suit of A in Abat. for Plff has a right to sue them sepa- rately if he pleases. Hob 137-8. Shaw 420.

But it is no cause of Abat. in Crim. cases that a prior Indictment is pending agt the Deft for the same offence - for the Ct having a discretionary power ever Indict will quash the one. Leiss in case of informations. for agst them they have no such discretionary power - of course they go on the same ground as other cases. 2 Hawk 275, 367, 1 Ba 13, 4 Ba 48.

If two Informations be exhibited on the same act the same person for the same offence, & by diff persons each will abate the other. (This is said doubtingly but is disputed.) Hob 128. Moore 864-5 Contra 1384.

7th If the Writ is unduly issued. It is cause of Abat. Indeed any irregularity or informality in gen will abate a writ Lawes Pl 105, Com Dig Att H1. If a writ is made returnable other than at the next succeeding term of the Ct provided there is diff times intervening it will abate or the Ct will dismiss it ex officio, It is void, & all transactions under it may be considered as (3 Wils 341, Sal 708, 1 Root 315, 316.) Trespass

Rule holds if the Writ ~~holds~~ is issued by one not having proper authority.

In Conn. Writ abates if there is no certificate of the payment of the Duty. The causes of the abatement of writs are various, as the want of Date, impossible Date &c I show you 1 Lev 2. Cro Eliz 92, 1 Sid 304, 4 Ba 43

Abat. of Writ

It is said to be a rule of Eng. Prac. that the Writ cant be amended. But McG dont like it. so far as it respects the date particular. But it has often been done in Conn. 1 Root 80

The defective Return of a writ will abate it - by the "defective return" is meant, an insufficient period of time between the date & the time of the Return. In Eng the necessary time is 15 days. in Con. 2 Ost 12, in Inspl. 6 22. Sal 53, Cro E. 30, 1 Sal 406, 2 Keb. 460.

At C.L. if the Sheriffs endorsement called his Return is insuff on the face of it. it will abate. But if it is good in the face tho bad in fact, it will not abate. — the party injured is left to his remedy in an act on the case agt the Sheriff. Stra 893. 1 Bl.R. 393, — Reason. At C.L. such official act cant be falsified except by a proceeding instituted for the very purpose of thus falsifying it. — Lucas Secus in Con. where it is competent for Defr to plead the false return in Abatement.

In Con. Prac. under the attachment law. If Writ is attached & no copy left with Defr. the writ will abate If the reading is omitted at the service of the writ it will not abate, but proceeds as a summons. 1 Root 54. 128. 363. 2 Root 130, 346.

But omitting to leave a copy with the town Clerk as the law requires is no cause of Abat, for this act does not regard the Defr. it is reqd only for the information of 3d persons But in case of this neglect the attach will not hold agt them third persons

Want of Venue in a writ is cause of Abat. want of it in Decl is cause of demurr. 5 Ba 322. 7 TR 243.

In Transitory acts the laying of a wrong venue is no cause of Abat. Ex Plf alledges the tort to have been com to

Abat. Writ } in the courts of A when it was comitt in the Cour of B. But in such a case the Ct may change the venue at discretion & send the acc to be tried in the Cour where the fact was comitted 1 Ba & 35. 1 Sid 44 Sal 669. Com 510, 1 B & P 20. 245 3 East 329.

The term "Venue". means vicinage neighbourhood &c. by "laying a venue" is meant local description, the place where it was committed.

In Local Actions. It is good cause of Abat: that the venue is wrongly laid

Rule the same in ains. of tres. quare clausum fregit for here the sub. on which the acc arose is local, 1 Co 2. 3. 1 Ba Ab 34. Com Dig Abt H 17.

6th If the Action is Misconceived it is cause of Abat. Ex Off sues on Debt when assumpsit is the only right mode of proceeding. Hob 199. Lawes Pl 106. Sid 379. Com Dig Abtg 5. This point decided the last session of S. Ct of Com. in the case of Biddel vs Swan. Oct 29. 1816.

7th If the Cause of Acc had not accrued at the commencement of the suit, it is good cause of Abat. Thus acc on a bond payable 1st Jan. & the suit is commd on it the 30th Dec previous Abat is plead with effect. exr acc on acc brot by Admr before he had taken out letters of Admn it is pleadable in abatement in this case tho the cause of acc had accrued. it had not accrued to the Admr.

If it appears on the face of the record that the cause of acc had not accrued. the mistake is incurable, & even after verdict it may be reversed by a writ of error 2 Lev 197, Hob 199. Carth 114. Bro C 325; 1 Show 147. Com Dig Abtg 6 acc. 2 These are the principal & perhaps the whole of the causes of Abatement.

Mode of Plead in Abat.

The Plea begins & regularly concludes to the writ, or in a few cases to the Dec^n — by praying it may be quashed 3 Bl 303. Laws P 108-9, 150, Ed 584. 5 Mod 132.

The Character of the Plea as being either Dilatory or a plea to the act^n is determind by the conclusion. But this Rule is not true in all cases. 4 Ba 50. Lucas 112 cr. 10 Mod.

It is determind in gen^l by the begining & conclusion. & this forms the criterion whether it is a Pl. Dil. or a Pl to the act^n

If when the Begin^n & concl^n are both the same & in Abat. it is a Pl in Abat. But if on the other hand, they are both in Bar it is a Pl in Bar. 4 Ba 49. La 107, 145-6. 2 Ray 593, Ed 584, 591

But when it goes in Bar only & it begins in Bar & concludes in Bar or begins in Bar & concludes in Abat. it is a Pl in Bar. for the sub. mat. goes in Bar. 2d Ray 1018, 6 Mod 103, 2 Saun 109.

And according to Chitty Pl 446. if mat. which is good only in Abat. is plead in bar both in beginning & conclusion, it is a Pl in Bar. — He says it down as a Mod. rule & made for the purpose of discouraging Pleas in Abat. — the Judgt goes in Chief. Rear. Bar admits the writ to be good.

Mr Gs Rule had been that when it began or concluded in Bar or Abat &c. it, the Pl, took its character from the sub. mat.

But mat. that is good both in Bar & Abat. if the Pl begins in Bar & concl^s in Abat & vice versa. the Defft may treat it as he pleases either as a plea in Abat. or as a Pl in Bar. 4 Ba 50, 1 Dent 136, 9 Mod 281

As to the Formal part of Pl of Abat & Bar see La Abt. 3 2 Ray 11, 53, 57, 92, 107, 116.

A Pl. in Abat founded on mat. good only in Bar is bad of course. — for

And mat which is good in Abat only & Plead in bar is bad, 4 Ba 14, 50, 1 Mod 244, 4 Mod 400, 1 Dent 128, 129. 1 Ler 312 2 Ray 1020

Mode of Plead^{r} Abat.

There are cases where mat: may be plead'd either in Abat: or Bar. Case of Outlawry or Alienage. it may be plead^{d} either in Bar or as a Dilatory Plea, at the election of Deft 4 Ba 50 1 Mod 244. but in such cases where the dam: are uncertain it cant be plead in Bar: 4 Ba 14

The Deft may not plead at once two diff^{t} causes of Abat: either to the whole or the same part of the Writ neither two Dil^{y} Pleas. though several may be plead in succession. But one Dil^{y} Plea of a given class only can be plead. though all which can be brought under any Cl. may be plead in succession. Cawes 107-8, Hob 250, Carth 89, 4 Ba 51.

This Rule has ben misunderstood from a rule supposed to be found in Co Lit 304 a, But this rule of Coke is as said down alone

In Eng: this Rule has ben so long & so gen^{l} misunderstood that it has become an estallished Rule, that a multiplicity of Dil^{y} Pleas may be plead at once

If Judg^{t} is rendered on Plea of Abat: error is prediable upon it as well as on a Judg^{t} in Chief. But error cant be rendered on a Judg^{t} on Plea in Abat: untill a Judg^{t} in Chief is rendered Reason is. That the Party upon whom the Judg^{t} is rendered on Abat: may prevail on his Writ the act^{n} which he may make

Rule then is. That a writ of error is predicable on a Judg^{t} on Plea Abat: while it will not lie untill Judg^{t} is rend^{d} in Chief.

On the other hand. When mat: of Abat, which is not mat: of error, is not plead in Abat: it is waived. And this the case of all mat: of Abat:. Reason It is Deft business to attend to such Pts of meere formality 2 Salk 765, Carth 124 Ba 51, Cro E 554.

But this Rule does not extend to cases where the Obj^{n} will support either a Plea in Abat. or to the act^{n} — for in such a case advantage may be taken either by a Plea in Abat or to the Action. Case of feme covert 4 Ba 39. 1 Ma 394 Stile 254

Mode of Plead^g Abat.

In a sci. fac. on Judg^t the Def^t can't plead in Abat. any mat. which might have been plead to the sci. fac. — This rule founded in convenience. Salk. 1 Ld. 303. Cro E 283 575. 4 Ba 51

A Writ may be abated as to a part & remain good as to the rest even if the plea go to the whole writ. Ex. A brings an act^n on cont^t agst B on two Bonds. on of which was made by B & C jointly. B may abate the Writ as to the joint Bond & proceed as to the other Ld 1065-7 2 B & B 428.

Def^t may plead Abate as to part of the thing in Demand & in Bar as to the residue. Ex. an act^n by A agst B on two prom. Plea to the one mony to the other non est factum.

As a Plea Abat does not go to the merits of the act^n, a Judg^t upon it does not in gen^l Bar a subsequent act^n for the same cause

But Rule does not hold when the Judg^t goes in Chief — When it goes in Chief it is a Bar — Lucas when it does not 4 Co 43a, 6 Co 7, 8, 46, 1 Vent 170, Com Dig act^n B4, 8 Co 97, 98

Three Distinctions as to Judg^ts rendered on Pl in Abat.

1st The Judg^t on Abat if for Def^t — is, that the Writ — or, as the case may be the Decl^n be quash'd, 4 Ba 50, 51, Cyb 112, 1 Vent 22, 2 Shaw 44

2d If for Pl^ff on Dem^r to the Pl. the Judg^t is — "quod respondeat ouster" or the Def^t must answer over — in some better manner: he then begins denovo by a Pl to the act^n or the like 3 Bl 303, 396, 7 2 Wils 367 1 Last 542,

3d If an issue in fact is joind & Abat. the Judg^t goes for the Pl^ff in Chief "quod recuperet" — The same as if the Pl^ff had recovered in a Pl to the act^n 1 Ba 157, Cyb 112 2 Ray 594, 1 Ray 119, 1 Last 54. This Rule does not hold in Crim. Cases. Capital. but does in civil cases & crim. on Penal St. 2 Shaw 334, 4 Ba 51

There is a Distinction peculiar to Com. regarding this last Rule

If the

Mode of Plead Alat. if the Issue is joind to the jury it is the same but if to the Ct. the Judgt is "respondeat ouster. — This Distinc has been acted upon. but it is a question whether the rule is good or not — pr Mr Z.

Alat is Plea in Bar. Judgt in Chief is rend for Plf. Judgt is rendered as on a Plea to the action 2 Ray 1020 1 Carth 634, 1 Salk 445.

If Plf is satisfied that Defts Pl in Alat will prevail, he may himself enter what is called a "Scire facias breve" praying that his own writ may be quashd 2 Ld 168, Sid 633

It is a rule, That Defft cant demr in Alat for a defect in the writ. A demr goes to the plea & if Defft does demr in this manner, Judgt goes in Chief in Civil actions Liens in Crim. Gil. C.P. 205 Wills 108, 479, 6 Mod 195, Salk 220, 7 Mod 97. As to Crim. Law. 394.

After a Judgt of resp. ouster the Defft is not permitted to make another pl. in Alat — he can make but one pl. of a kind — But when after Judgt in favor of Plea of Alat the Plf has amended his writ, Defft may pld Alat. agn — for it is considered as a new writ. Hob 126, 2 Saun 40, 4 Ba 51. Kirby 5-6.

By a Rule of C.L. no pl. in Alat is to be received after a gnl Imparlance or continuance. By a gnl Imparl. is meant (saving exceptions as to the Bill) 1 Ba 9. 3 Bl 301. 3 Ray 59.

Rule the same after the time of pld Alat has expired — for there is a time before which the plea in Alat must be made — that allowed by C.L. is 4 days after the commit of the Term Com Dig Alt. I 15.

In Com. the time allowed in the Sup. Ct is the third opening of the Court in the afternoon of the 2d day. In Com Pl. after the Jury is empannelled St. Com 342, 1 Root 564.

But when the Law itself continues the suit till the next term the Defft is intitled to the same time in the 2d Term to put in his Alat. as accord to the Gnl Rule is prescribed for the first Term.

Mode of Plead. & Stat. Exceptions to this Genl Rule. When the cause of Stat. has arisen after the expiration of the time. Ex. A feme sole brings a suit & then marries within the 4 days. Defts plead the mar. in Stat. La 178. Sid 777. Doct & St. 297

With this Excep. Mat of Stat. cant be plead in any form after the Rule is out. unless it goes in Bar. Visit does it must be pld in Bar. as there is no reason he should be precluded from pld this matter.

Pleas to the Action

Pleas to the action are of two kinds. 1st Genl Issue. 2d Special Pleas in Bar — It is not correct to say that Pl to the action are divided into the Genl issue & Pleas in Bar, for the Genl issue is a Plea in Bar —

Issue is defined to be a single material & certain point to issuing out of the allegations & consisting regularly of an affirmative & negative 1 Co 125a, 4 Ba 54.

Mr G. thinks the accord of that defn is unsatisfactory & improper. to wit. "material" for if an issue cant exist except upon a material point, then an issue cant exist upon an immaterial point: of which there are many cases.

Defn requiring regularly an affirm. & neg. According to the antient rule there must be a direct affirm on one side & a direct neg. on the other 1 Co 125a 1 Vent 213, 2 Bl R 1312, 4 Bl R 2795, 1 Vent 213. Ex If one party shd pld that J.S. was dead on suit a day & the other shd reply that "he was alive" — It wd not be a denial reply, it shd be "he was not dead". And this accd to Mr G shd be the plea for there is not a supposable case in wh it would be necessary to depart from it —

An Instance has occurred in wh the Deft pld yt he was born in France. Pl replied that he was born in Eng. & it was holden to.

Pleas to the Action } le a good Issue. 2 Stra 1177. 1 Wils 6. M^r G the reply shd have been "he was not born in France".

In a Writ of Right. The issue has always two affirmatives & is form'd thus. "The tenant says he has more right than the demandant" & vice versa. 3 Bl 304. La 111, 2 Stra 1177. &.

But the safer way is to form the issue according to the old strict Rule. It being the most simple.

Issues in Fact are either gen^l or special. M^r Lawes has added to these "common". But M^r G has seen this last term no where except in La. Pl. who says that the issue "non est factum in an act of event to hers, is common. because it does not deny the breach — But it denies the contract which entrues the breach — to the gen^l Rule see 5 Ba 54. La 110, 113, 3 BR 282.

The Gen^l Issue is a denial of the whole Dec^n of course puts in issue all the material allegations of the Dec^n 3 Bl 305; 4 Ba 54

A Spec^l Issue is an issue joind on some particular part of the Dec^n & the suit is rested on it. & so the Plf is not put to the trouble of proving all his allegations — This is a very convenient rule but is not used as much as it might be. 1 Sm 126a La 112, 113, 145.

An Issue simply is when an issue is joind upon any of the Pleas which follow the Dec^n

The distinction between a Gen^l & Special Issue is predicable on the Dec^n, for those wh. follow are simply, issues.

Gen^l Issues

In an act^n or "misfeasance" the Gen^l issue is generally tho not universally "not guilty."

Debt on simple contract — "nil debet" Specialty "non est factum." Det^n on Account Debt on Judgt "nul tiel Record" "never bailiff" or "never receiver" Assumpsit — "non assumpsit" Warranties in Covt^s "non warranted vendet." Do trouning in tort act

Pleas to the Actions { "not guilty" Replevin "non cepit" Disseisin "non disseisin." 3 Bl 305, 4 Ba 54 Bro C 257. 3 Mod 224. 2 Ray 1500. 2 Part 445.

To debt on simple Contt it was observed that the gen issue was "non debet" this is the appropriate gen issue tho' "not guilty" is good 1 Sk 402. Roy 56. Bro C 257.

In an act of assumpsit. "not guilty" was formerly adjudged a sufft plea. & it was the usual (usu.) an act "on the case". Now it is not thought a proper plea & is bad on demurrer. but is aided by a verdict 1 Lev 14, 2 Stra 1022. Esh Dig 167. 4 Ba 58 84

In Debt for Rent tho' the more prop. gen issue is "nil debet" it has been adjudged "nothing arrear" is good, as nil debet, Cro 618 Bro ent. 19.

But "nothing in arrear" is not a good gen issue in an act on covent broken for Rent. — for in this case the act is found on the express Contt & "nothing in arrear" does not deny the Lond as "non est factum" It is as improper as in act of debt on bond. & for the same reason that as it does not deny, it admits the bond & pleads only the avoidance.

But if the Plff. does not demur but joins issue. the Deft is let into any defence & can bring any proof that cd be brought into an act on simple contt — as, to deny the bond, the allegation of it &c & in fact put plff to the proof of all the mat allegd of his dec as on the plea "nil debet" — because the Plff by joining in the issue, voluntarily opens the whole cause to the jury. 1 Chit 478. 5 Esp 38. Com Dig Plee 4 W, 2 Johns. 18. & Do 82.

The Gen Issue Refers always to the Dec & not to the Writ — It is a plea to the act — If there in an act of ass. the writ charges Deft as receiver - generally, & the Dec charges him as receiver by the hands of A or specially, the Gen issue Denies the Dec for the Plff has confin'd himself to that particular mood of.

Pleas to the Action } suit 1 Inst 126. 4 Ba 54.

The Gen'l Issue concludes like all other issues in fact — to the country — as such is tried by the jury 1 Inst 126 a. 3 Bl 313 315. 4 Ba 54. This Rule however, not universally true, tho' at present almost so.

Not Universal for there are other modes of trying the Gen'l issue exist by jury, as by Record, Inspection, Certificate, Wager of Law & of Battle; the three former still remain tho they seldom occur exist the 1st & 3d Bl 339 & onward.

Gen'l Issue of "nul tiel Record" when it is tried by record is attended with some peculiarities — It always concludes with some verification. It is not tried by jury. Therefore it does not conclude to the country. The Ass. affirms the existence of it & prays inspection of it by the Judges & in this method the issue is closed La 146, 148, 226, 2 Str 1143, 2 Wils 113, 114, 5 East 473 1 B & P 411

But the Proceedings of foreign Municipal Courts are not Records. I say Mun'l Cts in Distinction of those under the Law of Nations. In this case under a Rec'd of a foreign Ct the conclusion is to the country, & not to the Judges because it is not a Rec'd 5 East 473.

Rule must be the same whe one Pl'd a Rec'd wh is lost or destroyed. for the plea of nul tiel Rec'd is no plea at all, for it can be proved as mat of Law as it can be found 5 East 473.

By a St of Con. the Parties may in all civil cases, by mutual agreement conclude all mat. of fact to the Judges, and in this case it must conclude to the Judges St. Con. 26-7. And generally all issues before a single magistrate are to be tried by himself as he is allowed no jury — upon this a single Justice concludes accordingly.

Pleas to the Action } The form of tendering an Issue in fact.

If the traverse or denial comes from the Deft he concludes thus "and of this he puts himself upon the country for trial". If from Plf "& this he prays may be enquired of by the country" 3 Bl 309, Co Lit 126a. 4 Ba 54. If however the issue tendered by the Plf is in negative terms it may conclude in the former manner & the conclusion is good especial on demurrer 10 Mod 166. In either case the issue is joined by the opposite party's adding "and the Plf (or Deft) doth likewise", this is called adding the similiter. 3 Bl 315; La 147. 8. 1 Jn 126a.

When in Cov. an issue in fact is put to the court the party tendering it must express in the conclusion "that it is done by agreement &. "Of this by agreement he puts himself on the Court for trial"

It has been often divided that the omission of a similiter is not aided by verdict. This omission in Cov. is aided by verdict. (Hunting. ton v Barbeck) 2 Day 392, Stra 641, Cow 407. 1 Saun 319a, 3 Burr 1793, 2 Saun 319.a.n.b 1 Chit 570 n.2

An issue always closes the Pleadings & when well tendered must be accepted 4 Ba 55, 3 Bl 314, Co Lit 126a. 1 Saun 338, Comb 86, Carth 82. If not it may be demurred to

The words "in manner & form" which are generally used in tendering an issue in fact are sometimes of the substance of the issue, sometimes words of form only Sal 120, Stra 317. Ex. Gen Issue pleaded to a battery — said to have been with swords clubs &c "manner" is not put in issue

Lines, when they are originally material Ex. Deft pleads feoffment by Deed. Plf traverses it. "vabo" et formā. Co Litt 281 4 Ba 56. Now a feoffment without deed tho good at Cl. cannot be proved

For the deed in the former case, is of the substance of the issue, the words "vero" et formā" tho generally used are not necessary since (La 121 Com Dig Pl G1) except when the words alledged to attend the principle fact are material

(b) Rules respecting a Repleader. 1st At C.L. a Repleader was allowed before trial, because a verdict did not cure an immaterial issue; but now a Repl^r ought never to be allowed 'till trial, because the fault may aided by the Pleadings.

2d That if a Repleader be denied where it shd be granted, et vice versa, it is error.

3d That the Judgt of Repl^r is general viz. "that the parties shd replead;" and the Parties must begin a fresh at the 1st fault that occasioned the immat^l issue. 12 Ray 169.

4th No costs are allowed on either side — 5th A Repl^r can not be awarded after default at the Pleas — A Repl^r can't be awarded after a dem^r, or writ of error, but only after issue joind; Vit is not grantable in favor of the 1st pers. who made a fault in Pldg. Sid 124

(c) A negative pregnant is an allegation which leaves room for an affirmative implication. An affirmative pregnant leaves room for a negative implication.

(c) Whether a negative or affirmative pregnant is ill upon gen^l dem^r does not seem settled. A neg. or affirm. preg. is good pld when the neg. or affirm. implied is not sufft to maintain what is alledged on the other side. As in a pld of usury Def^t pleads that it was corruptly agreed that Pff shd have 15 p^r ct. And Pff replies that there was no such agreem^t to pay 15 p^r ct — This is a neg. preg. & good tho' notwithstanding there was more reserved than lawful Int. for this does not prove that 15 p^r ct was not reserved as the pld that the reservation was 10 no implication tho' that will be allowed. Salk 114 The traverse ought to be, "that it was not corruptly agreed in manner & form &c this would avoid the negative pregnant.

Pleas to the Act. — Issue } These formal words are not put in issue, the circumstances, attending the principal matter traversed, "as time, place manner &c" unless they were originally material & necessary to be proved as laid La 119, 120, Stra 817, 2 Saun 319, 2. c.

An Immaterial Issue is. One which having a material allegation ~~fact~~ on the other side, is taken on and which is immaterial & does not decide the merits of the question 2 Saun 319, a. n. 6. Gil C.P. 149. 1 Lev 92 Cro J 494 582 Ex. as mat. of mere inducement or aggravation, or mat. immaterial, impertinent, surplusage &c. It is not aided by a verdict Ex in Assum. agst Ex, he pleads that he (instead of Testator) did not promise 2 Saun 319, a. n. 6 Carth 371 - (b) Replication awarded 4 Ba 56, 1 Wils 338 3 Bl 395, 2 Vent 96 Com R 148, 2 Mod 137. "arrest of Judgt" 2 Saun 319 1 Chitty 692

(a) An Issue on a negative which imports other affirm. mat. (which constitutes a negative pregnant) is bad. or on an affirmative pregnant) Ex Plea of "Release since the date of the Writ." Replication "not his deed since the date of the Writ &c. — This is a neg. pregnant. 1 Sm 126, 303 Cro J 87, 312, 5 Ba 201, 1 Root 88.

Formerly this was held to be a radical defect. But it is now cured by a verdict. 2 Hen 8. 2 Saun 319 n. 6. Gil C.P. 147. Cro J 87 whether the verdict is for Plff or Deft and such pleads is good cause. when the negation or affirmation implied in it is not sufft to maintain what is alleged on the other side L. 114.

(c) A Negative Pregnant it seems is ill on special Demr. only 4 Ba 98. 1 Ba 94. 5 Qu? 2 Saun. 319 n. 6. Gil C.P. 147, 153.

An Informal Issue is one taken on a material allegation but not rightly taken in point of form. This is aided by verdict 4 Ba 56, 2 Saun 319 c. 3 Bl 395, 1 Ba 103, Carth 371, 1 Lev 92, Cro C 227. 2 Mod 137, 10 Mod 19 So both Rules Ex. making the day & Place part of the issue (or a material point) when they are immaterial 2 Saun 319 n. 6 (post).

Pleas to the Action – Issue } The Gen[l] Issue covers the whole Def[ce] usually but there are cases when the Gen[l] Issue is improper when the facts alledged in the Def[ce] are not intended to be denied. Thus when a Cont[t] is sued upon, which is void through the incapacity of the party who made it. Def[t] in this case may plead the gen[l] issue & then give this incapacity in evidence. there is no allegⁿ of Def[ce] denied. – The Law considers the bond or cont[t] as a nullity & in point of law it is not the act of the Def[t] 1 Bow Con. 97. Sal 97. 2 Bl R 1082, 2 Wm 145, 3 Keb 228. 6 Mod 311, 12 Mod 109

But when a deed sued upon is void in its own nature & not from incapacity of the party, the Gen[l] Issue is not the proper plea. & a bond given on usury, the usury must be pleaded specially & not given in evidence under the g[l] issue — for the instrument was the act of the obligor, he not being incapacitated at the time he made it. Rule the same when the bond is only voidable 2 Bl 292. Esb 223.

When the bond is voidable tho' an incapacity not absolute but qualified the gen[l] issue is not the proper plea. & Bond by an infant void & Esb 223 4 Ba 54, 62, 5 Co 119. Plow 68 Gilb L.E. 162-3, 2 Ray 313, Hob 72, 168, Sal 175. Stra 1088, Cro C 415, 3 Burr 1805.

Gen[l] Rule of C.L. that if a specialty is made void by St. the spec[l] mat[r] for which the St. makes it void must be pleaded. Non est factum is not proper as in the case of usury supra. 5 Co 119. Hob 72. Esb 223-4 Gilb L.E. 163, 2 Bl R. 1108. For the defence is in all such cases inconsistent with the gen[l] issue

Release, loss of seal, Alteration, Want of complete delivery are taken advantage of under the plea of "non est factum" – for they all go to shew that the deed when sued upon is not the act of the party 5 Co 119 a. &c

Gen[l] matters of fact only are in question under the gen[l] issue of non est factum & not matter of Law. according to the C.L Rule. Esb D 224

For Exceptions in favour of feme-covert sued on bond, & the rule in favours other cases attend by St. / see "Title by Deed" & "forgery" in

Pleas to the Action. Issue } Rule of C.L. as to the distinctions between those defences which are & those which are not admissable under the gen'l issue is, If the defence is consistent with the plea it is admissable, Lions if inconsistent.

Still it is a Gen'l Rule in Eng. That in acts of indeb. assum. any thing which shews that Pff had no right to recover at the time of the plea plead – may be given in evidence under the gen'l issue — The promise laid being merely the consequence of the duty stated.

To that whatever extinguishes or disproves the duty, extinguishes or disproves the promise. Ex usury, Duress, infancy, release, payment &c Wms 419, 4 Ba 501, 2 Rol 684, 3, 2 Bur 1010, 2 Ray 787, 3 Bur 1353, 2 Wils 143, Doug 108

Quere. Does this Rule hold in spir'l acts.? Semb. not on principle Chit 197, 8, Esp 147, 4 Ba 501, 134, 5 Mod 18, 2 Ray 566. But in Prac. the Rule applies to both gen'l & spec'l acts. 1 Lev 122. Sal 140. But NP 57-2 1 Mod 210.

St of Limitations, tender, accord & satisfaction (Quere 2 Ray 566) Set off, bankruptcy must in all cases be pleaded specially. Chit B. 198 Saun 280, n. 2. 3 Ba 915, 2 Ray 733, Sid 375, Esp Dig 147. They being mats of law which do not go to the gist of the act but to the discharge of it. i.e. which destroy the act or remedy only. Whereas the defences of the former sort usury &c deny or extinguish the duty 2 Ray 917.

The Rule holds as well of Endsl. acts as of spirial acts semb. 1 Saun 280, n. 2

Defences that may be made under the Gen'l Issue

In debt on sings. bond Deft may rely on the St of Limitation under the gen'l issue — also on a Release — In the reason that the plea "nil debet" is in the present tense. ergo the evidence supports the Issue 2 Ray 566. Sal 278. 2 Lev 215, 1 Saun. 280 note. Low 548. 2 Wils 143, Doug 445.

In acts Deft may take advant of the St of frauds under the gen'l issue 2 Lev 214. 1 Brown Ch 92. Ex Plea no assumpsit. St. Frauds may be plead in evidence.

Pleas to the Action Issue

By a rule on the pre. page (b) In an act of indeb. apt Deft may give in evidence any defence which shews that he is not liable in this particular acty — This is peculiar to these actions

This Rule does not hold in act^ns of Tort — Thus in ejectm of Ters. a Release cant be pleaded in evidence under the gen^l issue. for it does not support it.

Mat^r of Justification must be pl^d specially in all acts & cant be given in evidence under the gen^l issue — Reason. It is inconsistent, contradictory to it. 4 Ba 60. 2 Bul 282. Hob 174-5 Cow 498. Bul. N. P. 17.

Contra. It is an Univ. Rule, that any defence which cant be spec^y pl^d may be given in Evid. under the gen^l issue — & this rule is necessary for the Justice of legal Proceedings La 111

The above Rules of L. have been very considerably varied by the Local Sts of many of the States of the Union

In Con. It is an uni. Rule established by St. that Deft may give in evidence any mat. of defence whatever that goes to the gen^l issue. Except some act of the Plff which ndrelies the Deft from the acty A Con. 552. 4th Pl^s — By the "act of Plff" is meant, some act which is a discharge of some right of acty once existing As a Release in a act^n of Ters.

But an act of the Plff antecedent to the alledged cause of acty may be given in evid. under the gen^l issue. Case of a License in act^n of Ters. Contra to the C.L. where confined to gen^l issue. 2 Kirby 208. Diffe lies in the act being antecedent & ex post facto.

And an act of Plff shewing he never had cause of act^n may be got in Evid. as. Durep. Coverture, Infancy, Usury. — Durep does not acquit the Plff of any cause of act^n he might have had — but precludes such a cause from ever accruing. Kirk 209. 3 Dane Ab.

Pleas to the Actions. Issue } In Civ. the St of Lim. may be
relied upon under the Gen[l] issue in all[s] sounding in Tort as well as
in Debt. — This contra to the C.L. there in all[s] sound[g] in tort. the
St of Lim. must be pleaded specially 3 Ba 518, 4 Ba 67

It is said by Swift 2. 215. That the St of Lim. cant be re-
lied upon under the gen[l] issue in all[s] of Deb[t]. — because it contra-
dicts it. M[r] G. It can. for it is enough that it operates as a Release
of the right of action.

In cases of Book Debt or simple cont[t], a Release may be g[n]
in evidence under gen[l] issue, tho it is an acquittal of the Deb[t]
from a Debt ence due. — It was not made to prevent the Deb[t]
giving in Evid. any mat. that cd be given in evid. in C.L. but to enable
him to give in evid. that could not be plead[d] under the gen[l] issue
at C.L. So whatever cd be plead[d] at C.L. can be under the
St of Con. 2 Day 272. Sal 278. Cow 588

Exc[p]. It was divid by Sh C[t] of Con. that a Release cd not
be plead[d] under gen[l] issue in indeb. Ass[t] — But M[r] G. thinks
the decision incorrect tho he won it himself. Bruce
v Cattin 4 Day 284.

A Deft instead of Gen[l] issue, may pl[d] any single traverse alle[g]
that goes to the gist of the act[n] & concludes to the Ct. Ley Sup-
pose that there are several allegations which are nec[ss] to establish
the cause — the denial then of one is suff[t] to divide it. & the Pl[f]
is then relieved from the trouble of proving all his allegations
Lev 174-8, Com Dig Pl C 1, 1 Sa 282. Syl 195. Doct Pl 203. Gilb C P 51.

In this case the traverse may & ought to be headed to
the whole Decl[r]. — If it is pl[d] in ans. to part only the residue must
be ans[d] in some other method. — But when the pl[d] is to the
whole he is not bound to make any other ans[r]

Now tho a Spec[l] Traverse is proper & special plea alledg[g]
new mat. & amounting to the Gen[l] issue is regularly in evid-
misplaced

Pleas to the Actions – Issue } inadmissible — for it is pleaded "not guilty". Ex. pleading an "alibi" is thes. ex that the property belongd to another. Hob 127. Cro C 157, Cro C 268. 3 Lev 11, 3 Bl 309. 10 Co 95.

Diffr. A spec. Plea ad to amt to the gent issue when the special mat. alledgd in it goes to the denial of the mat. in the Declr Ex is a thes plea – the property was another's.

Rule correct in principle. Nothing ought to be pleadd as spec. mat. Deft, except when it is of such a nature that it is necessy for the Ct to decide as to its legal efficacy. Ex thes. Deft pleads an "alibi".

Ex Con. title is pleadable in an act of thes. but it is under the St. Laws at C.L. there it amounts to the Gent issue. 2 Con 425, 3 Bl 309.

Case where the C.L. varies from the Rule that Deft cant plead spec. Mat that amots to the Gent issue

1st Matter amtd to gent issue is good at C.L. if it amts to a Justification – Must be pld specially. — Reason he pld it with the gent iss. as a Justif which must be pleaded specially – Ex of such a Plea in 2 Lev 40. Cro C 268. 1 Saun 298 note, Sal 107-8, Hob 127, 295. Com Dig Pl C 17.

2d The Ct may at discretion allow such pl in particular cases, as in Lang. of Hob. "if the mat. thus pld is such as will breed a dispute among the Coy gents. Cro C 371. 2 Mod 166, 174

3d In this Assise a spec Plea of Title may be pleadd by way of giving colour. — Defr hereafter p.

With these exceptions a special plea amounting to gent issue is not allowed.

There is some contradiction in the Books whether such plea offd is good cause of Demurr or of motion to the Ct that Deft be compelled to enter the gene issue. some think it cause of Demr. others that the Ct should compell him to enter the gen issue. or suffer Judgment

Pleas to the Action. Issue } by a nihil dicit. & this last M^r G thinks the true Rule. 10 Co 95a Cro C 112. 157. Cro C 471, Jenk 305. for Def^t on the other side. Hob 127. 1 Lev 178. Crome J. 165. Co Lit 303. b 2 Mod 274. 5 Mod 18. 2 Day 191.

If however the Ct refuse to allow this Plea, & Def^t refuses to pl^d the gen^l issue, but joins in the Dem^r. Jud^t goes agt him — & Pl^ff may enter Jud^t as by a nihil dicit. 10 Co 94. Jenk 305 5 Ba 202. Cas J 165, 319, 4 Ba 61, 134.

A Spec^l Plea alledging facts which wd not prove the gen^l issue does not of course support an issue to the gen^l issue — thus a Release in Ass^t may be given in Evid. under the gen^l issue, & may be plead^d specially. If Plea does not deny but admits & avoids the allegat^n of Pl^ff therefore does not amt to gen^l issue. 2 Ray 889 Sal 394. 5 Mod 18. Chit-B 197-8, La 112, Sid 391. 399. Burr 356.

In an act^n of Debt brot by a Penal court — the Conventions may be plead^d and the issue non est factum. in evidence La 129 2d Ray 989.

And in pursuance of this prin. it is a custom of Con. to plead specially other defences than acts of the Pl^ff amt to a discharge. tho they may be given in Evid. —

Special Gen^l Issue. As this kind of pl^g is generally limited to act^s in Debt, it is often call^d a special Plea of non est factum As it states special facts which go to the Gen^l Issue. & concludes with the gen^l issue. It is call^d a special gen^l issue — & as it

N. to the Act. The Gen. Issue } on a bond. given by a feme covert. the proof the coverture. Gilb L.E. 164. 265. Plow 66. 1 Vent 9. 216 Sal 274.

Ld Coke says all special non est factum are impertinent.

According to the opinion of some this plea must conclude to the country, & others think it should conclude by a Verification. Mr G think the former rule correct — as to this see 3 Keble 25 Plow 66. 1 Vent 9. 210 Sal 274. Esp Dig 222. 4 Ba 82, 89. As to the Verification see Moore 78 Roy 112. Gilb L.E. 164-5. The former opinion is undoubtedly the correct one for if it conclude with a verification it looses its special character & becomes a special plea amounting to the Gen. issue rendering it nothing short of an absurdity.

But Pff may plead out & take issue upon the special mat. for Deft is limited to his special matter alledged — & if this special mat will not support the gen. issue it may be demurd to & an infant pleaded it was not his deed — because of his infancy — It all depends upon the mat of inducement Sal 274-5.

There can be no use in taking the issue upon the special issue — for the issue is upon the special mat. under the Gen. issue Gilb L.E. 164.5

This was the only way of pleading in antient time, in case of special mat. 5 Co 119. Gilb 163-4.

Special Pleas. in Bar. or as they are often called special pleas to the action.

It is defined to be a plea which admits the facts stated in the Decr but avoids them. As in an act of Debt on bond — Deft pleads Release & thus admits the truth of the debt being due, but avoids it by Release 4 Ba 2, Dyer 66. La 37-8. 115, 129.

It is remarkable that this rule is no generally to be found in the books & is not a general rule for this Pl in Bar does not always admit the facts of the Decr to be true

Spec. Plea in Bar } Pleas in law where the most material facts of the Dec. are traversed tho' it does not put the Plff to the trouble of proving all the allegations of his Dec. Hob 104, 2 Vent 79, Cro E 90, 418, Le 116 121, 116, 148.

Its Definition is simply this, that it is a Plea which alleges special matter in Bar of the act. — any special Plea in law corresponds with this definition — It does not admit all the allegations - but it does admit all the traversable allegs it does not traverse & goes in avoidance of them. as in case of Accord, Debt on bond Release pleaded - which avoids the Debt. 4 Ba 2. 93, Sal 91.

But a plea of Estoppel does not either deny or admit & avoid - it only goes to preclude the Plff from averring the facts alledged - whether they are true or false is immaterial, for this plea is fatal to them Lawes 24, 170, 140, 145, 154, 161, 170, 3 Mo 305. Wills 13, 3 East 346 354.

In Ld Justification it is a Rule that Deft must expressly confess what he does not deny, of the facts in the Dec. If in an act of assault & Battery, the Deft instead of denying, justifies the act as not amounting to a Bat. the plea is ill. for if this amounts to any thing, it amounts to the gen issue — Ill is bad for it does not deny the Dec & does not allege mat. of justifn Cases Ha 24, 3 M 298. Sal 394. Carth 340.

Either party may admit any allegation of his opponent & then make it a support of his own. But Mr G seems not. expressly admitting this allegation, for he always has a right to make the best use he can of his opponents allegations Lev 143 164,

By Mr Gs Deff. A Spec Pl in Bar always alledges some new mat. & it is usually in the affirmative — but there are many cases however, when this special or new matter is negative Ex Covent Plea Contra. Did not perform his part of the contract 3 M 309.

Spec. Pl. in Bar } All mat. is special or new, which is alledged & is not an express denial of the facts alledged by the other side — so that what is not a denial is special mat. as Insanity, Duress, Coercion Release, Usury &c.

As a consequence of this proposition all special Pleas must conclude with a Verification & not to the country. M. cannot conclude to the country, because until the gen. issue is joined, each party have a right to reply either by a denial, Demurrer, or confession & avoidance — & for this purpose the Pl's must be kept open wher as observed before ( ) is done by a Verification 1 Saun 103 n 2, La 149, 159, 3 Bl 309-10, Cow 575, 2 Burr 774, 3 Burr 1725, 4 Bl 362.

There is one exception to this rule made by 4 Geo. III, viz. that in a Pl of Bankruptcy it may be concluded to the country. La 144-145, 224, 227.

Pleas which are merely in the negative need not be verified i.e. the form of Verif. may be dispensed with, & Issue joined without it — & it may be concluded to the country. M. Gilbert observes the reason to be that a man cant be compelled to form a negative Wills 5, La 145.

But Pleas that amount to a complete & formal Issue must conclude to the country — provided they are triable by a Jury But an act of parl. till record tho a direct Gen. Issue does not conclude to the country Ray 98. Carth 58, La 145, 3 Bl 309.

When Deft alledges distinct mat. to diff. parts of the Dec. he may conclude each part with a verif. or the whole with one gen. verif. Ex. as aft. on Note of £100 Plea to £50 pt, tender of £25 — non ass. as to £25. 1 Saun 336 n 6, 339, Sal 298, 312, Carth 43.

Observed, that all Pleas admit of course what they do not deny, hence to Debt on Bond, nil Debet is a bad plea — for it does not deny the Bond, — & admitting it, has no avoidance 1 Saun 79 n, 3 Lev 170, 2 Ray 1500, 2 Str 778, 780, 4 Burr 2586.

Spec. Pls. in Bar

Requisites of Spec. Pleas in Bar.

1. Without mentioning to L^d Coke Rule Mr G observes that all spec. pleas in Bar must contain issuable matt. If they do not the pl is idle, the act. Ct. Pl. - it was always ready to try, — but nothing can be tried in issue 2 Wms 74. 2 La 137-8.

2. Every Plea in which law & fact are so blended as that they cannot be seperated — is ill — Ex act for conversion of goods. Defft pleads he had a lawful right to all the goods of felons within the district — the Pl is bad. for tho the right would be an issue & the ground of the title another he should have pleaded the letters patent or act of parliament from which he derived his right, & then the manner in which he obtained his title &c 2 Sid. 2 La 138.

3. A Spl Pl in Bar must go to the whole cause of act^n or it is bad upon the whole — thus in an act^n of assault & Batt^y & maihem. Defft pleads mat^r of justif^n only for the Assault & Batt. & not for the maihem the pl is ill upon the whole & the Jury are to find damages not on the maihem alone but also on the assault & Battery. — he should have plead specially to the maihem — Reason is that cannot be divided. 1 Saun 28, 2 Sid. 2, 2 Saun 50, 127, 2 10 b.c. Brod & Gr 265 3 Lev 379, ___ 104

The same Rule holds as to the subsequent Pl^s — so if the Repl^n is bad as to part of the pl in law, it is bad as to the whole. &c. - 1 Saun 28 n 2, 337. 2 Saun 127. 1 Sid 40.

Defft may make diff^t pleas to diff^t parts of Dec^n — & this is not contra to the rule thus as to £100 Plea payt of £50. tender £25 &c as to the remainder non assit. — here no one of these pleas will answ to the whole Dec^n but together they do. — but no protestando is made that the Pl to any part answers to the whole - so that this does not come within the former Rule.

Spec. Pleas in Bar. Regis } that. plea in answer to the whole &
which is good only to part — is ill as to the whole & a pumpit for £
100. Pl. Deft he has £ 100 in bar of Plffs demand. — Ol. ill. for Deft does
not deny the debt of £100. 4 Co 82, 1 Saun 24, Cro E 268 330, 434
Cro J 27 La 135 5, 171 Lo also, in an act for the recovery of goods
given Deft to keep & convey. he pleads a discharge from his obli-
gation to keep — this does not deny the obligation to keep, convey.
so the answer is made only to a part. Hob 28. 4 Ba & Cro J
676. 2 Rol 214.

Distinctions to be observed as to the mode of taking advan-
tage of this special plea in bar.

If the Pl imports to be an answer to the whole Dec & it is
good in bar only of part — It may be demurred to, & see above

But if it imports to be an answer to part only & it is in bar
of part only — it is called a discontinuance & as such Plff may
take Judgt by nil dicit & not by Demurr. For Plff is not bound
to accept neither will the rule allow him to accept of an ans.
to a part of his Dec & if he demurs he discontinues his own
suit 1 Saun 24 n 3. Sal 179. 12 Ray 931 Str 703. Gil C.P. 155, 158
4 Co 82. La 135 5.

But suppose the Pl in bar imports to be in bar of part
only & in point of Law it is a good defence to the whole. Is
Plff to Demurr or take Judgt per nil dicit. By the rule this is
not good pleading — but the authorities on this point are
irreconcilable. see 1 Saun 24 n 3, La 136. 2 B & B 427, 1 Sel. N.P.
4, 4 Co 82. Str 703.

M^r G "I can see no doubt on the point, he ought not to
demur but take Judgt per nil dicit. on the record. But
he cannot accept an answer to part as one to the whole.

A^r. If the plea begin in answer to part & conclude in

Spec. Pl. a Bar. Destens. & answer to the whole Pff should Demur on account of the inconsistency — for it imports to be a plea both to a part & to the whole, a B & P 427. La 170.

But the gen. Rule does not require that Defft should expressly answer such parts of the Decr as are not material & of the gist of the actn, thus he need not expressly answer mere matter of aggravation. In this the Decr is of assault & Battery & other enormities, this last "other enormities need not be answered.

Neither need matter of Indicement be ans.d for it is no part of the cause of action. 1 Saun 28 n 3. and the answering that which is of the gist of the action covers the whole Decn. Thus in this case breaking & entering Pffs house & expelling him from it. It was adjudged that the answer to the breaking & entering was an answer to the whole grave amer, for it being the gist of the acn. & the expulsion of Pff but mat. of aggravation. But if Pff would take advantage of this mat of aggravation, he must do by a novel assignment, which would make it a substantive cause of action. see 3 Sr 392 - 397 Rule 1 Sr 479, 636, 1 Wils 555. 3 Bl 311, 2 Wils 20. 1 Saun 28 n.

There is an imperfect description of a novel assignment in 3 Bl 311. But the true Description is

A Novel assignment consists in alledging specially with all necessary circumstances, what is alledged too generally in the Decn or it is making that a substantive ground of acn in the Respn which on the face of the Decn appears to be mere matter of aggravation. — under the former part of the Defsn it is adding certainty to what is stated on the face of the Decn La 70, 163. 197. & for the form of it see La 240.

A novel assgnt in the Respn becomes virtually the new Decn & it connects into the gist of the acn what before was mere matter of aggravation

The rules of Pleading are such, as here to suffer the Defft to reply as if to the Decn for here in fact he has a new Decn agst him. Lc 165 1 Saun 299. 3 East 294

Spec. Pl. in Bar. Nov. Assign.

A Novel assign always concludes with an averment that the wrongs alledged in it are diff. from those justified in the Plea, for this Plea justifies merely that which is in the Decn. And this Averment cant be traversed. but if it is untrue Deft may plead the gen. issue, which implies that there is a diff. from that in the Decn La 164-5, 240-1, 1 Saun 299 n 6 Ex. Case tres. Assault & Bat. Deft pleads a justification by virtue of a writ ca. resp. Pl replies by a novel assign that the tres was before the beg. of the writ. Deft pleads the gen. issue, which implies that the tres alledged in Repl is diff. from that in Decn.

A new assign is only necessary where there is but one count in the Decn for if there were as many counts as there were wrongs, &c (Assaults alone) & some of them can not be justified, the Pff may prove those without a new assign. because to them Deft will be obliged to Plead "not guilty &c" 1 Saun 299 n 6.

The new assign is an acknowledgment that Deft has justified one &c so that a new assign cant be brought unless there were two counts.

It was anciently necessary for Deft to set forth specially all circumstances (however numerous,) of defence consisting of special matter of avoidance. Gen. Pl by way of avoidance was not allowed by C L, 1 Inst 303. 4 Co 93. 4 Ba 90.

But in modern times this rule is altered & general pleading is allowed to avoid prolixity. & indeed it is wonderful how the old rule could ever have prevailed.

Rule now is. When the particular facts which are matter of avoidance, would if pleaded specially tend to infinitenes (as it is called). Gen. Pl is allowed. & the Ct will learn from the nature of the defence when this would be the case & will regulate the pldgs accordingly. Thus in a case in Cont. the performance of which consists of a great variety of facts - the plea to it may be general. In an action the Land given by a Under Sheriff - he pleads generally the performance of his duties correctly for the pff he had acted as under Sheriff. Thus

Plea in Bar. Distinct } applies specially & alledges the particular
cases of breach. Agt Slee is a case of a Brewer in London who
agreed to deliver to Pff all the grains thrown out of his Brewery. Now
there were thrown out in small quantities every day, — he need not
shew specialy the selling of each parcel — but general performance
of his agreement. & Pff must alledge specialy the particular breach
Sav C. 749. 916. 1 Sid 215; 234. 1 Just 303. Cow 375. 1 Saun 117 n.1, 2 Saun
410 n 4. 1 Ro 753.

Every Plea must be consistent with itself — hence repugnancy in a material point — vitiates the plea — & indeed it is radical. But repug. in an immaterial point is of no consequence, & is treated as mere mat. of surplusage — thus on a Spec. Demurrer it is bad, it being mat. of form & that only. 1 Just 303
2 Lev 233. Sal 325; 1 Wils 98, La 53-4, 170

When Defft justifies under a Writ, Warrant or any Authority he must set it forth specially. Alledging generally that he acted by virtue of a certain Writ is not sufft — or in case of a Sheriff acting by virtue of a certain Execution, without describing it — for the Court cant determine whether the writ gave him lawful authority or no. But if it is described, they can see it on the record 1 Just 283 a, 1 Saun 298 n 1, 2 Saun 402 a 1, Sal 107-8, Com Dig Pl C 217. Hob 127. 295. 3 Mod 137-8. 4 Mod 378.

We are now through with the requisites of Spec Pleas in Bar. as the forms of them cannot be taught by Lectures, but are to be acquired by practice, for their forms as to the commencement & conclusion see La 138. 145. 159. 161, 3 L Rag passim.

Traverse

A Traverse is a denial of some particular facts alledged by the other side — and regularly consists besides an issue — It may be taken to any part of the Pleadings 1 Just 282, Dyer 195.

Traverse } When a traverse is preceded by matter of Inducement it is properly a technical traverse & not as Mr Lawes says a special traverse, 4 Ba 67. The Induc.t to y.e trav. ought to be suff.t in Matter.

It is observed in some of the Books that the traverse closes the issue. This as a general proposition, is directly opposed to what it should be. Tho it does sometimes, still 19 times out of 20. a tech. tra. concludes with a verification — & this always, if it be a special as well as a tech. tra.

The Inducement is when Deft pleading the gen.l issue, sets up a title for himself, or sets forth a particular specification of his case, with a justification thereof &c with a traverse absque hoc &c. 4 Ba 67

The Traverse is regularly preceded with an "absque hoc" (to that without that") & this does not in general close the issue 5 Co 24 4 Ba 67. 1 Burr 321, La 121.

1st of a Technical traverse. Eg. Deft pleads as a grant of title that J.S. died seised in fee & devised the premises to him. Plff intends to deny that J.S. had a right to devise & that he was seised in fee. To be perfect he ought not to be barred for J.S. was seised in fact absque hoc he died seised in fee — & this Def.t concludes with a verification — the words "absque hoc" being technical words of denial. Then Deft pleads over that J.S. died seised in fee in fee & puts himself on the country.

Now these technical terms merely tender the issue & do not close it. — And this is correct language, but there are cases where the traverse does close the issue — but they are merely exceptions.

These words, (absque hoc) were altered to be technical words of denial, but they are not indispensible, for the words "et non" are equivalent to "absque hoc" 1 Saun 22, La 119.

But a gen.l Traverse ("absque tali causa") containing the whole matter which was alledged on the other side, does in gen.l conclude to the country. Now these conclude to the country because

Plead^g Traverse } it is unnecessary the pleadings should be kept open longer, as it amounts to a denial of the whole plea of the other side. How what special matter cou^d Def^t have to allege in support of his allegations when they are denied in toto. 4 Ba 67-8. 1 Sau 103, 103a n3, 1 Bur 317. Bro C 117 as cited. 167. Sal 4. 2 SR 499.

It seems however that a gen^l traverse may conclude with with a Verif^n or to the country — because so are the precedents — & this is the only reason, — for it is contrary to the very reason of the rule — so to have a gen^l traverse conclude to with a Verif^n — for it is the object of all plead^g to bring them to a conclusion as soon as possible. But no practical harm can arise from concluding a gen^l traverse with a ver if^n except it affording liberty to the opposite party to pl^d over — which is harm enough. 2 SR 443. 1 Sau 103a. b La 122, 2 Bur 1022. As the rule is contrary to this mode of concluding M^r G hopes it will be allowed only in those very cases which are the same with the precedents.

Almost all Traverses are special, & this is no objection to the gen^l rule that these gen^l traverses conclude to the country for they are spec in comparison.

As to the appropriate use of that part of gen^l issue "de injuria propria sua" see 8 Co 67. La pom 154 to 156.

A Technical Traverse it was observed, is preceded by an absque hoc. This differs from one of another kind viz a Direct & positive Denial. in common neg. language. And they differ in their conclusions as well as in their Diction

The latter sort (viz in com^n neg. Lang.) is proper in all cases where the party tendering the issue has no occasion to introduce new or special matter. When this is the case there can be no occasion for any Inducement for the traverse. 2 Sau 206a, 207a, 1 Sau 103 a, b, 2 Wms. 364 n.

No 5.

Traverse } As a traverse is so common a thing in spec pleading it is necessary to understand it.

Of a technical traverse preceded by an Inducement.

In an act on Specialty. Defft pleads usury, "that it was corruptly agreed that Defft should pay & Plff receive at and after the rate of 10 pr ct. interest. Plff is to reply by a traverse. & his Repr is that the contt was made upon good & lawful & with the reservation of 6 pct interest absque hoc it was corruptly agreed to pay 10 pct. — Here is an example of a technical traverse.

Example of a traverse in com. neg. barg. Defft as before pleads it was corruptly agreed Defft should pay 10 pr ct. now Plff dispenses with the matter of Inducement ("that it was made on good & lawful consideration &c") & Replies, he ought not to be barred for it was not corruptly agreed to pay & receive 10 pr ct.

Now why is not the latter as good as the first mode of traversing? In some cases it is & then it should be used. But the technical is used in most cases to prevent a neg. preg. which the plain traverse in com. neg. barg. often contains. As in the present case the repr that it was not agreed to pay more 10. leaves room for the implication that it was agreed to pay & receive 9 pct but in this case however, it could be of no importance for the 9 pct would be just as usurious as 10 pct. The technical would effectually prevent this neg. preg. for the plain amount of it, is, it was agreed to pay 6 pr ct. & not 10 pct. That being the inducement 4 Bac 67. 77. 2 Burr 1042. Roy gen. 2 SR 439. 2 Str 971, 1 Burr 321, La 1160 1165. 145, 149. 2 Ch R 364a

It is very necessary to understand the distinction between general & special, technical & plain traverses.

I have observed that a technical traverse concludes generally with a verification this is not universally true that generally. And a traverse in common neg. language concludes

Traverse } to the country. Now one of the latter kind (without any
Induct forms a complete issue & hence it is frequently called an
issue

Whether a wrong conclusion of either of these traverse is ill
on gen! Demurrer or not — the opinions are not agreed. It was
formerly determined to be wrong in substance & of course ill on special
demr & this was the old Rule. but by Statutes 4 & 5 Ann. that rule
which before was matter of substance was rendered matt of form
& ill only on spec! demr as I apprehend all such errors now is.
for the diff! opinions see Ray 94. Cro C 117 or in al. ed. 164. 1 Vent
240, 1 Sau 103 b, 248 n 5; 2 Sau 190 n 5.

When an allegation on one side is expressly denied on the
is com. neg. lang — superadding a formal technical traverse is unne
cessary & improper & therefore demurrable. As in the Defence
in the case of Mary Talmer. Plff replies It was not corruptly agreed
to pay 10 p! ct. & the rejoinder adds. a technical traverse that it was
agreed to pay & received 5 p! ct. absque hoc to pay 10. The indor-
sement here being useless, it is demurrable — for at this rate the
parties must go on ad infinitum. 4 Bac 57. 2 Str 877, Cro C 755;
1 Vent. 101, Ray 98. 2 Sau 188.

I would here observe that in the language of Pleading — concluding
with a verification & concluding with an averment mean one
& the same thing & both are used in contradistinction to concluding
to the country, the word "averment" means this, the thing he is ready
to verify.

It is a gen! & important rule that when one party alledges new
matter inconsistent with any of the antecedent traversable all-
egations of the other side, & which does not form a complete issue
— he must traverse those allegations As in the case of Mary. Pl
pleads a corrupt agreement to pay 10 p! ct int. Plff replies. & says the
agreement was to pay 5 p! ct for good & compl consideration, this is —

Traverse } inconsistent with the allegations of Deft & it forms no issue, he must add the absque hoc, it was agreed to pay 10 l. &c. Sign Deft pleads his ev. Deft was dead at the date of the writ, Plff replies he was alive, that is not matt. he must proceed absque hoc he was dead. 1 Wils 253, Hob 103 1 Sam 22, 2 Sam 207 c, n, 209 n, 3 Bl 309

But here there is a material Diversity to be noticed. When in answer to an negative allegation it is necessary for the other party to set forth some new affirmative matter, the doing this must not conclude with a traverse of the negative matter alledged on the other side, altho that new matter be absolutely inconsistent with the neg. mat. alledg'd. but must conclude with a Verification, — Thus to an act on an arbitration bond. Deft pleads no award. Plff there replies that was an award & sets it forth specially. This tho expressly denying the Plea of Deft must be concluded with a traverse, but must be with a verification, & this is indispensible that the pleadings may be kept open, Hob 293, 6 East 568, 7, 1 Chit 60, 197 La 150.

It is laid down as a gen Rule by Lawes & Comyns, that a Negative traverse must have a proper Inducement or it will amount to a neg. preg. This is founded on a observation of L^d Hobart, which was applicable to the case under consideration, but he does not lay it down as a Rule. Indeed the laying it down as a rule would be incorrect, it would be beginning at the wrong end (says J.G.) to say that the neg^t traverse must have an Induc^t, for without an Inducement there would be no neg^t traverse.

Rule should be, that without a proper Induct, the Traverse would amount to a negative pregnant. for the Induct should be prefix'd Thus in act^n of tres. for assa^t & Bat. Deft pleads molitus manus imponit Plff replies he did not — here is a neg. preg. — the Rep^n clears room for

Traverse } the implication "he did injure him" he should have replied by
praising the Inducement, "that, he (Deft) committed an outrageous Battery
absque hoc molliter manus imposuit — Agn Deft pleads P is
dead. Pff replies P is not dead & that without an Inducts & then is no
neg. prag. he might have added an Induct with an absque hoc. but
it would have been altogether irrelevant

Indeed the Rule as I have laid it down, holds in gen[l] only when the traverse
taken by itself, without any Induct, includes particulars, which are not
material, & thus makes them a part of the issue. & here the Inducement
is sure to shew that the immaterial parts are not in issue.

On the other hand when the party merely confesses & avoids by
new matter of his own, what was alledged on the other side, the tra-
verse is improper, for the new matter would be inconsistent with the
parties own pleading; as the traverse denies the what is alledged
on the other side, so were the traverse tendered, he would deny by it
what he had before allowed by the confession & avoidance. Eg as[n] on
Cont[t] Deft pleads Infancy at the time of making the contract. Pff replies
he made a promise after full age, confessing the Infancy. now here
would Pff traverse the Infancy he would deny what he had just allowed.
as[t] Release pleaded by Deft. Pff replies it was obtained per fraudem
absque hoc he gave him a release. Here is a contradiction. & there-
fore the traverse can never be proper. In all these cases the
new matter must be concluded with a verification. Cro E
384. Cyle 121, 2 Mod 158, 3 Bl 309-10, 1 Wils 253, 1 Sau 22n, 207n5-
209, 2 Sau 5n3.

I will observe here in passing that when a traverse
is preceded by an Inducement; the traverse is but a conclusion
of fact from the Induct. in all cases where they both go to the same
point

Traverse ξ point of complaint or Defence. Thus in this. Deft pleads
I S did not seise in fee & denies the land to him Plff replies I S did seise
in tail absque hoc he did seise in fee. here is a conclusion of
fact from the Induct." for if he did seise in tail, he did not dis
seise in fee - or in com. lang. he did seise in tail, therefore he did not
in fee. And if this conclusion does not follow we conclude
the Inducement is improper

It was observed that a technical traverse concludes
with a verification & regularly tenders an issue, & this is done by the
opposite partys affirming over & then concluding to the country, For
instance, here upon Plff replies I S did seise in tail absque hoc he
did seise in fee. The issue is closed by Deft rejoining, I S did
seise in fee as he in his plea in bar has heretofore alledged, & then
puts himself on the country for trial. Sal 4. 1 Inst 126 a, Le 149
4 Ba 67, 68.

Coke lays down the Rule that an issue joind on an abs-
que hoc ought to have an affirmative after it, the meaning of
this is that a negative cant be traversed by an absque hoc, otherwise
there would be two negatives which would be a formal defect. Exe
Deft pleads his co-defendant not alive, Plff cant reply he was alive absque
hoc he was not alive, this in com. lang. would be "he was not not
alive". 1 Inst 126 a, Le 121.

The omission of a traverse when necessary seems to have been at
C.L. considered as matter of substance & as such fatal on a genl demr
but the St 4 & 5 Ann it was made merely a defect in form & reached by
a special demurrer only, 4 Ba 70, 2 Mod 60, 1 Lev 43-4, 1 Sau 103 b.

Genl Rule that, When a material Traverse is taken on one
side, there can not be a traverse upon a traverse by this is
meant, that when one of the parties has tendered a material tra-
verse, the other party cannot abandon that & tender another upon
the same point or ground of defence claim or title, for he shall not abandon

Traverse } see traverse & tender and the

This is usually a most perplexing point to Students, & you will find it well explained by Ld Holt in his Language) page 104 this Repr.

Note the distinction between a traverse upon a traverse & a traverse after a traverse. In this says J.G. consists all the difficulty

1st There cannot be a traverse upon a traverse, Ho 104, Hut. 79. 1 Inst 282, 1 Ro Rep 409. 2 Mod 183, You will bear in mind that this 2d traverse goes to the same point or ground of action, which was embraced by the 1st traverse. Deft pleads in a quest. of title that J.S. Died seised in fee & devised the lands to him. Plff replies that J.S. died seised in tail absque hoc he died seised in fee. Now here Deft cannot rejoin that J.S. died seised in fee absque hoc he died seised in tail, but he must accept Plff traverse & conclude to the country. for both these traverses go to the same point & if Deft should be indulged & allowed to plead on the traverse, the Plff in turn would be entitled to the same indulgence & so they would go on ad infinitum.

2d But on the other hand, a Traverse after a Traverse is good, even tho the point traversed is material — This is no point of difficulty with Students.

A Traverse after a Traverse is, an which does not go to the same point or ground of defence claim or title embraced by the first — Such a traverse is good. Thus in an action of trespass, charged to have been committed on a particular day, Deft pleads he acted on that particular day by virtue of a license. Now this is not sufficient, for Plff may support this action by any thes. committed either before or after that day & before the date of the Writ, the action being transitory. Therefore Defts Plea does not cover the whole cause of action, he should have pld the license as matt of Inducement & traversed all thes either before or after the day & before the Date of the Writ, thus, he entend and

Traverse } a license on that (particular) day absque hoc as to all ant-
ecedent tres.s & all subsequent tres.s before the date of the Writ. — Now
here the answer goes to two different things to wit, the inducement which
is the justification or license to one thing — the particular day — the abs-
que hoc or traverse, to all the trespasses either before or after the particular
day. "Is the trespass justified is one & that traversed is another". If Plff traverse
— the justification, it will not be a traverse upon a trav. but a trav-
ense after a trav.

Now says L.d Hobart the Plff is not bound to join in that traverse of the Deff. for altho in point of fact there might not have been any trespass committed either before or after the particular day, still Deff might not have had a license — & this he would be precluded from denying if he joind in the traverse. Therefore the very nature & justice of the thing requires he should be permitted to plead on the traverse, affirm over & traverse the license, so that Plff may do either of two things, plead the trav. & traverse the license (which is a traverse after a traverse) or he may join in the traverse to wit, "that he trespassed either before or after the particular day" & conclude to the country.

Now says J. Gould all this embarrassment is easily removed as soon as we understand this distinction, between a traverse upon a trav. & a trav. after a trav.

But this mode of pleading is not the best. The most simple mode would be for Deff to plead specially as to the particular day & the gen.l issue to all the — E.g. Thus in tres on charged on the 1st Nov.r Plea of Deff as to all tres.ses committed either before or after the 1st Nov.r not guilty, as to a tres on the 1st Nov.r he entered under a license, & here the Plff will join the general or special issue as circumstances require.

This is now the more usual practice

Traverse } 1st There is an Exception to the gen. Rule that there can be no trav. upon a trav. When the first traverse is immaterial: here the opposite party may treat the 1st traverse as a nullity & tender a traverse upon the Inducement. Thus in an acn for cutting and selling the Plffs trees. Plff cutting is the gist of the acn. Deft pleads other special matter & traverses the selling; absque hoc he sold them — the selling being immaterial matter, Plff may abandon the trav. & take issue upon the inducement, to wit. the cutting.

Or a clearer case — Deft pleads he used the trees in making necessary repairs absque hoc he sold them. Now here Plff may abandon the trav. & take issue upon the induc.t — the necessary repairs — or he may demur specially to the ~~inducement~~ plea 4 Bac 73. 6 Co 24. Cro C 99. 1 Just 242 b, Str 117. 4 Br 440. 1 Saun 21 n. Cro J 221. Cyls 151. Hob 104.

2d Exception. There may be a traverse upon a traverse, when in an acn of trespass charged to have been committed in the county of A Deft pleads a local justification in the county of B with an absque hoc that he committed the trespass in the county of A. Plff here may either traverse the special justification, or join in Defts traverse at his election. E.g. gra. Plff declares in trespass for taking his goods in the county of A. Deft pleads a local justification viz. that he was Sheriff of the county of B, & took the goods by vertue of this authority in the county of B. (with an) absque hoc, he took them in the county of A. Now here Plff is not obliged to join in the traverse (that he took them in the county of A.); but he may traverse the justification to wit that Deft was Sheriff of B. For the acn is transitory, & if he was obliged to join in the traverse or not permitted to abandon it, he would be precluded from availing himself of his right to bring a transitory action in what county he pleases, & liable to be imposed upon by the falsity of the Defts plea; as in this case he could support his declaration by proving the goods to have been taken in the county of B. which he otherwise might do, Thus Plff may traverse the ~~justification~~ Induc.

Traverse } i.e. the justification i.e. that he was sheriff of the county of
B. Which joins the traverse upon the traverse. see Bohun 101. Cro
C 99. 415. Cro C 105. 4 Bac R 489. 5 Bac R 367. 1 Hen Bl 403. 1 Chit 6th 597. 2 Wils 182
1 Saun 22n. Com Dig Orig 18.

These distinctions says J.G. I never fail to recommend sev-
erously to the critical attention of Students.

When the cause of act" lies in the Decl" is divisible, so that Plff
is entitled to recover as much as he can prove. Deft cannot make that
part of his plea which is an answer to a part of the cause of the act" an
inducement to the traverse of the residue. Thus in a plt for £100
a plea of Deft that he had paid £50 absque hoc that he owed any more —
would be bad. for an issue is here traversed only for the £50. Now sup-
posing the fact to be Deft owed but £50. Plff would have a right to
recover that, & if he should be obliged to join in a traverse for the £ 100
he would be precluded from claiming the 50 due.
Agr an" in the case for the obstruction of their lights, Deft pleads justif"
for the obstruction of two absque hoc he obstructed three, the Plea is bad
for if there were but two obstructed Plff would not be obliged to join in
the traverse of 3 for he would not recover if he did join.

In these cases the only correct mode of Pleading is to give the
gen" issue to that part to which the Deft does not plead specially & spe-
cially as to the residue. — Thus in a plt for £100 Deft pleads as to £
50 non assit. & as to the remaining £50 payment.

The party to whom the traverse is tendered does not of course ad-
mit the matter specially alledged in the inducement by joining in the
traverse. It would be hard for him if he did for he is obliged to
join in the traverse when tendered, & thereby he would be entrapped by a
false inducement.

When the traverse & inducement both go to the same point
and are properly adapted to each other, joining in the traverse includes
a negation of the induct. & the gen" Rule of admissions does not here

Traverse } him to admit that, in the case, which he does not deny, for the traverse following the indict. implies a denial. Ex gr. of title D. pl. pleads I did seised in fee & seised & Aff replies, he did seised in tail alegnshes he did seised in fee.

But where there is an impertinent indict. the joining in the traverse is not necessarily a neg. of the inducement.

Protestation. To avoid such admissions in some future controversy, the party joining in the traverse, out of abundant cautions often uses a protestation.

But the Protestation does not affect the cause in which it is used, for it is not in issue & is no part of the pleading, but a collateral averment not going to the act, to prevent a conclusion which would be of use in some future action, 1 Ba 64 n. 1, 7 Jon, Com Dig Pl. C. 86. La 141. 143.

On the other hand. The party traversing, admits of course all he does not traverse, for he is at liberty to deny what he pleases, but the party not traversing, does not admit what precedes the traverse for he is obliged to join Sal 91. 1 Wils 338. 4 Bac. 73.

To the party traversing. A Protestation may often be necessary for as he admits what he does not traverse, & does not wish that to stand confessed on record which might be of use against him in a future contest he avoids the effect of it by a protestation. It is as Lo Coke say 'an exclusion of a conclusion'. 3 Rl 311. 1 Inst 126. 2 Bac. 241. 2 Burr. 1023. Lit. sec. 192.

And this is the only mode of denying those allegations which are not issuable or cannot be properly put in issue; & the probative powers its being given in evidence, preserves it a support in some future controversy. As the Prot. is no part of the pleadings, repugnancy or any other fault in it does not vitiate the pleadings Com Dig Pl. C. La 142

Traverse §. The form of a Protestation is this "& the Plff or Defft (as the case may be) protesting that such & such & such allegations are not true, for Def, &c Plea, &c Repl &c (as the case may be) saith thus to wit. ——

A Traverse can properly be taken only on a material point — by a material point is meant — one which is decisive of the cause of action. A Trav. on an immaterial point is demurrable on account of its immateriality 6 Co 24a. 1 Roll 235. Comb 321. 2 Lev 5. 28.

If however an immaterial Trav. is tendered, the advantage is taken only by special demurrer; since the Stat 27 Eliz. c. 5 & 4 Ann, c. 16 it was considered as a defect in substance & to be reach by gen demurrer, but the Statutes under which was before mat. of sub. now a mat. of form, & so to be reached only by spec demurrer. 1 Lev 14. 21 2 Lev 207 cyh. 319. a. b. Stat 694. as to the ex Rule ybr 194. but this not law now Stat 4 16 & 17 & 18.

And yet however if the parts to whom the immaterial traverse is tendered join in the Trav. It is sometimes aided by verdict — & sometimes not as the case may be & when not Judgt is arrested & a repleader awarded. When the verdict is found on the merits of the case it aids the defect, when on the immaterial part it does not aid it. 2 Lev 319 a. & 6. 1 Lev 228. Sal 596. Carth 371, Cro. Jame 494. 585.

Again. a Trav. can be taken only on an issuable point — for there are material points which the rules of pleading do not allow to be traversable: so that the Trav. must be taken on a point both material & issuable. in gen what ever is material is issuable — hence matter of law however material can never be traversed — a plea in justification can never be traversed, & Plff tho' he had a right to sue by virtue of an execution. Matter on what is called a quia gen. or a verbiage cujus be traversed, for they are not issuable either must all be left to the court. Hob 103. 2 Bl R. 776. 3 Wils 234. Ld 46

Traverse 5 La 46, 117. 11 Co 86. 2 Wms 182. 1 Saun 26 8 a, n. 22-3 n 298 n, 2 Keb. 667. 5 Bac 66. Com Dig Pleg 14.

Plea a Plea. can be taken only on a single point of defence for if it includes more than a single point of defence it is double which is ill for double pleading is not allowed. But this single point need not consist of a single fact, for several facts are often necessy to constitute one point of defence. This well laid down in 1 Bar 320. see also 3 Lev 40. Bull NP 93. 1 Bac Abr 80, 8 Co 66.

In the application of these rules the Reader will find no difficulty when he can distinguish between the distinct grounds of defence, for he can never mistake but with respect to distinct single facts there is often confusion.

In the case cited from Burrow, an action for tres. for turning cattle into Plffs land. Deft pleads that the land was a common & that he had a right to turn his cattle in. Plff here could not traverse both the lands being commonable & the Deft right to turn in his cattle, but he could either that the land was commonable or the Defts right &c. now to take the latter as the point, it is necessy to support it that they are Defts own cattle & that they were levant & couchant &c. & these constitute but one ground of defence.

A Plea an amend pleaded. Deft must shew all the circumstances to wit. submission to the award the meeting of the arbitrators, the hearing & the publishing &c. but Plff cant traverse all these for they are Defts but he may the meeting & publishing for they are both Defts are as to the making

If there are two material points the person traversing may take either but not both 6 Co 24 a. 1 Wms 338. Com Dig Pleg 10

Nothing except what is alledge or necessarily implied can be traversed. for a Trav. is essentially a denial by one side of what was alledged on the other. Case ass. on cont within the St of Fr. without alledging that it was in writing, now Deft cant traverse it it was in writing. Plea should be it is bad alegue how it was in writing.

Traverse } 2 Vent 79. Sal 528-9. 1 Sam 205. 312 n. 2 Sam 10 n 14. Com Dig
D^r G 13. Carth 99.

A Traverse in such a case is now ill only on special demurrer by St 4 & 5 Ann. because it really sets out in the form of a trav. what properly should be set out in the form of a spec^l plea. The matter appears it is true but it does not appear in its proper form & therefore is demurrable. 4 Ba 75. 2 Roy 235. 1 Sam 312 d n 4.

Any material point of fact appearing in the pleadings may be traversed, whether the party alledging it has put it in the form of a positive substantive allegation or by way of suggestion only, or by way of recital Ld 48. 2 Sam 205 & an 21, 22. Ld R 169. Com Dig D^r G 11.

When the party justifies or in any other way confesses & avoids only as to a part of what was alledged on the other side. his traverse or other avoidance must be coextensive with the part not justified or answered. otherwise the whole substance alledged on the other side will not be answered. Ex in act^n of tres. suppose Deft pleads a license on the particular day & nothing more. the plea is ill. a^gt he shall a license on the particular day absque hoc any tres. before that day. still ill. but it should be absque hoc any tres. before or after that day. vide 2 Cop Dig of writ her it cures the whole ground of act^n Hob 104. 2 Mod 65. 1 Sid 293. Sal 222. Ld R 87. 1 Lev 241. 307.

I must observe however, that when the justification is laid on the same day on which the tres. was alledged to have been committed, there is no need of a traverse as to any other time for prima facie the tres. alledged & the one justified is the same 5 Ba 205. 7 Sal 42. 1 Bulst 198. 1 Sam 14. 2 Sam 5 ab. 295 b.

But suppose the justification laid is for a tres. on the same day as the one alledged. 9 Co 81 relies on one committed on another day & there was actualy a license on the particular day. — The Rule does not embarrass the point at all. He has nothing more to do than to make a novel assignment & answer the Deft^s plea for the case

Traverse § is the same as if relies on a tres different from the one justified. Agn he had a license to enter on that day, but he exceeds his license. As the license ~~can't~~ permits him to cut one tree on the 1st. Pff must assign a the justification that he cut 2 trees. Now see the inference that Deft entered by a license is avoided. or that the tres. justfd & complained of were the same Bull N.P. 17. Cro C 185. 964. Ray 86. 3 Rep 711.

And if the trespass is laid on a day certain & on divers other days it seems that the justifn of the tres on the day certain is suffl prima facie on the Demurr. & Pff must make a novel assignment of the trespass on the other days. 2 Lev 96. 6. 5 Rep 636.

And it seems to be the better opinion that turning both before and after the day justified is now not material. If Deft reply even that the act justified is the same as that complained of. Thus. Deft pleads a license to act on the 1st of Nov - the tres was laid on the 25 Oct - & avers it to be the tres. complained of. Pff would see traverse the justification. There seems to be no reason why the avert should not be suffl. see. 5 Ba 207. 1 Lev 144. 2. 298. 2. Com 161. Sal 84. Cro C 887. 2 Lev 96. Contra - that this is not good 1 Lev 1 Vent 184. 2 Keb 878. This is the practice in conveyancing.

Use of Indict. As a traverse well tendered obliges the opposite party to join in it. Of what use it is often asked is the Inducement? No reply or issue can be made or taken to it! It is observed in a publication on the Laws of Com. — "that it is mere parade" but this is not true. But often times it is of no use, & a traverse in com. neg. pregs. would do as well. And often times it is of great use. as 1st to prevent a negative pregnant as it does by limiting the traverse. & 2d When used by way of it answers a very important purpose in some cases. — Here there are two cases where the trav. & induct. both go to the same point.

And when the traverse & Inducement go to diff points. the Inducement is absolutely necessy

Traverse } necessary to cover the whole Declaration. & if it were not-
for the Induct in these cases. part of the Decl would remain unanswered
here then it is as necessary as the traverse itself.

And then says J.G. are what I take to be the uses of the Inducement.

The Inducement to a traverse must always be of issuable matter i.e. the fact on which the traverse is founded must always be such, that an issue might be taken upon it were it in any other part of the Pleadings 2 Lan 32. Cro C 336. — The reason of the Rule is, that when the trav & Inducl both go to the same point the traverse is a conclusion from the inducl. & of course the trav. cannot consist of issuable matter unless the inducl does also.

& If the Inducl & trav. go to diff. points the Inducl. itself is traversable & therefore of course must consist of issuable matter, so that the Rule is both rational & necessary.

A Trav. generally pursues the terms of the allegations traversed — but it is not always right. as it will not always be sufft. but sometimes contain a negative pregnant. Thus in tres. Deft pleads a Release since the Date & the Writ. Pff replies it was not his act & Deed since the Date of the Writ. now if he traversed with an absque hoc he gave a release. the traverse is improper for it has room for an implication which vitiates the plea viz. & that he gave a release sometime or other. And it is a good Rule that no issue can be joined upon a Neg. Neg. 1 Just 125a. 303a. 5 Co 32a 201. Str 493. 1 Lan 268-9. Com Dig P. R 5.

Agt. Suppose then in an action on Contt Deft pleads tender at a particular place — when there was no place mentioned in the Contt And Pff replies with an absque hoc he tendered at that particular place. the traverse is bad. because of its following too strictly the terms of the allegation it forms a neg. neg. by leaving room for the implication that Deft tendered at some other place. Lu 114. 2 Lan 319. 2 Lu 12. he should have traversed modo et forma.

Com Dig P.91 X
La 120

Traverse

There is a distinction to be noted between a Plea of payment on a contract on or before such a Day. & payment on such a Day. And this occurs often in practice.

Here is an Accon on Contt for payment to be made on or before such a day. Deft pleads payment before the day and Signs the Day. Plff replies & traverses the payment at the on or before or after the day. he must demur to the Plea because Deft paid before the Day which he had a right to do. 2 Burr 944. 2 Wils 173. This is a case sui generis. for Plff traverses what was not alledged on the other side & is so alliged to do. for Deft pleaded payment on or before that Day which was consistent with the terms of the contract. Now Plff to shew that he was entitled to recovery must assign a breach. & to do this, he must traverse what was not alledged by Deft. 2 Stra 994.

But the other hand when money is payable on such a day & Deft pleads paid on that Day. Plff has nothing more to do than to traverse the plea modo et forma. for the Day ought not to be put in issue. Case the money was due on 1 Novr. Deft pleads paid on that Day. Plff replies Deft did not pay modo et forma. — This is a Deversity in Pleading not frequently to be met with.

But if Plffs allegation is that the money was payable on the 1st Novemr. & the fact was that Deft had paid & Plff received the money before that day. Deft should not plead payment before the Day but on the Day on which it was due. & then give in evidence the payment before that Day. & this evidence will support his plea. 2 Wils 150. 1 Burr 944. Com Dig. Pleader E 97.

I would observe here that a negative payment is by the Jew Act aided by verdict & is now ill only on special Demurrer 4 Ba & Ald Com Dig 97. 312. 560.

* A traverse is usually tale & concludes modo et forma these are merely formal words & it seems not indispensible even in point of form.

Synopsis of the Rules of a Traverse

From 1st Saunders 22 n2

1st When any material fact is alledged in any pleading, which, if denied, will upon issue joined, decide the cause one ~~side~~ way or the other, if the adverse party plead a matter inconsistent with, & contrary to such allegation, he must traverse it

2d When soever such traverse is taken, the other party is bound to it, & cannot waive & tender another traverse; for the parties are not to go on ad infinitum.

3d If the traverse be not to the substance, and point of the action, the other party may either pass it by, & tender another traverse or demur specially, for the cause.

4th In some cases a traverse may be taken after a former apt & pertinent traverse; as where in a transitory action laid in such a county, there is a special local justification, with a traverse of the county; the Pltf may either traverse the special local justification or join in the Defts traverse at his election

5th But where a material point alledged by one party is fully confessed & avoided, i.e. where the other party sets up a matter consistent with such allegation, but which if true, is an answer to it, there he cannot also traverse it.

6th Lastly a traverse ought not to be taken but where the thing traversed is an issuable fact. 11 Co 100.

Duplicity.

Duplicity or daublenes in pleading or double pleading as it is called, is a fault because it tends to unnecessary prolixity, confusion & vexation 1 Inst 304 a. 3 Rl 311.

A double plea is one which consists of several, distinct and independent matters alledged to the same point & requiring different answers. Or it may be defined to be one consisting of

Duplicity } of several distinct & independant allegations to the whole or the same part of the claim or Defence.

Two distinct & independant answers cant be given to one point whether it be to the whole or a part of what was alledged 1 Inst 303b. 304a. 4 Ba 118. 1 Sal 180. 3 Sal 142. 1 Sam 3367

But giving Diff answers to Different parts of the Dec or Plea does not constitute Duplicity. Thus Deft may plead the gent issue to a part of the Dec & specially to the residue Plff may traverse part of the Plea & Demur to the residue. &c for each answer is given to a distinct point La 101, 1 Inst 304

And at C L if there are several Defts, each may plead a single & Diff plea to the whole or the same part of the Dec for no one of the Defts is bound by the plea of the others but each may plead a Diff Defence if he pleases. Hob 70. 2 Str 1140. 1 Str 670. 2 Ray 1372. Tyr 13.

If however an action is brought or a Court against two Defts they cannot sever in their plea. — Unless they choose Diff Defences, in which case J G. supposes they can. They cannot sever in the gent issue for then each is both. & is as good for one as the other.

This Rule does not appear to have been sustantively settled any where except in Massachusetts 6 Mass Reps 444.

It is a rule that every plea must be single, connected, entire & confined to one point. 3 Bl 311 But this point need not as is observed by (Mayo) consist of a single fact, for often times several facts are necessary to support one ground or point of defence as in pleading an award of Arbitrators. This point of Defence must consist of several distinct facts & submissions, meetings &c., The Rule seems to mean, that the Plea must be confined to one

Duplicity } single ground of defence. Thus the award of arbitrators cannot be pleaded without setting forth the meeting of the Arbitrators the making & publishing of the award, & Defts submission to it. for the gnl Doctrine see 1 Burr 320. 2 Ld Raym 1028 1 Lal 142 4 Ba & Ad, 120.

Defr in an action for malicious prosecution he may plead all the grounds of suspicion on which he acted at the commencement of the action, for they all go to the probable cause of the mal. pros. Bro C 134. 671. 904.

I would just remark that all these particulars however numerous require but an answer & that but a short one — "De son tort demein (of his own wrong or head).

But when the Defendant on some act or evt of the Plff for his justification, he must rely only on one — for one is as effectual as more when the act itself constitutes the defence Erb Dig 535-6

But when the justification or defence, is a consequence of another fact — they may both be alledged. Thus in an action agt Administrator. he pleads plene administravit all the goods in his hands, this last is a consequence of the former that he had fully administered & the point is single Com Dig Pleading 2. Plowd 140a. 1 Burr 320.

From these cases it is apparent that one point may consist of several facts.

Again several distinct counts in one Dec. each being itself single & either intended to establish one right of action or several, do not constitute Duplicity.

But on the other hand if there are several points in one & the same count requiring several distinct answers, that count is double

As to the Object of introducing several counts to support

Duplicity } one cause of act. 3 Bl 295. But I can give it to you in a few words. It is. To enable the Plff to meet all the possible turns the cause may take. & these Counts are only diff modes of supporting the same act. when used singly. though Plff may in some cases rely upon the whole

Surplusage never constitutes duplicity, but as such is rejected. Thus if there are two distinct Defences alledged & one of them is frivolous. it does not constitute duplicity but the frivolous one is rejected as nullity. Thus in an action Contt. Deft pleads payment & also that Plff is a Jew & that Jews are not pay. the payment alone can be relied on. the other is rejected 1 Ld 175. 1 Keb 661. Dyer 42.

Duplicity in the Decr is unnecessarily joining in one Count distinct grounds of actn of similar or of different kinds to enforce one cause of actn. There is a case in Vent which illustrates this Act on the case. Plff declares. That in consideration of a sum of money pd Deft promised to deliver him ten Pots of Pot Ashes, & he delivered 10 pots of Ashes mixed with Dirt, with intent to defraud him. The Decr had. for it requires two diff pleas. "Not Guilty & non assumpsit. The examples of these double counts are two at sea 1 Vent 365, Cro C 20, 2 Vent 198. Com Dig Pr C 38 Abat 84. Act G. 2 Ray 404

In Debt on penal bond the assignment of more than one breach is duplicity at C.L. for one breach is a forfeiture & answers all the purpose that could be obtained by the assignment of more 1 Ba 544 Comb 297. 3 Sd 108. 1 Vent 114. 126. 2 Lu 25 to 27. 2 Wils 257

But in Covenant broken. Plff may assign at C.L. as many breaches as he pleases. for as he is entitled to recover according to the amount of damages, he should be permitted to assign all the breaches to ascertain that amount. 1 Ba 544. Cro C 175. Com Dig Pl C 33

In Covn. the rule is & long has been the same in Debt on bond. For by the St Plff recovers only the actual damages, therefore

Duplicity } he is permitted to assign as many breaches as he pleases
St Com 27.

By the 4 & 5 Wm 3. a similar rule is introduced into Eng. wch provide that Plff shall recover only the actual damages assigned or so much as he can prove. 2 Str 920. 455. 2 Wils 377. Com 357. 2 Burr 920. 3 T Rep 111. 1015.

Notwithstanding this rule of C L. that two distinct defences cant be pleaded to the same cause of acct. By the 4 & 5 An. by leave of the Court he may plead as many as he pleases. & thus the C L rule is abrogated, so far as their Statute extend. which is no further than to the Dec^r answers or pleas to the Dec^n. 4 Ba 121. 3 Bl 318. Com Dig Pl C 2. 2 Ray 1099. La 27-8.

During the course of the last year (1815) a similar law was made in Com. I had been trying four or five years to get such a law made but it did not get through the Legislature the last, It is certainly a very important rule, for often an unfortunate choice will be made between different defences so that justice will not be done without such a rule

Duplicity by St 27 C is reduced to matter of form only so that advantage is to be taken of it only by special demurrer tho before it could be raised by gen Dem^r. but now the demurrer must be particularly special, even to the particular point in which the Plea is double 2 Ba 134. 1 Sar 337. 2 Sal 219. 678. 2 Ray 932. 798. 1 Wils 219. Com Dig Pl C 93. C 2.

I would observe that the double pleading is regularly not allowed, viz^t if two distinct sufficient answers are given by the opposite party to what is alledged on the other side. if he does not Demur, he may & indeed must traverse both answers, or the one he did not traverse would stand confessed as it would which would be ruin to decide the suit agt him — & the traverse of each point must be single 1 Vent 27. 4 Ba 119.

Dupli^{ty}. Profert & Oyer

The rule requiring the Demurrer to Duplicity to be special does not apply to a^{cn} when Pff. joins in one Dec^{n} Dift causes of acn which refer to different claims & which cannot be joined. But this is not Duplicity but a misjoinder of actions. & it is reachd by general demurrer. & Pffs joining this & those. is ill on gen^{l} Dem^{r} for there is no one Judgt at C.L. which will reach both these claims. Duplicity is a defect in form only. but here are two incongruous causes of acn joined to enforce distinct claims. Sal 10. Ray 237. 2 Lev 99. 1 SR 274. 8 vin 287. Comb 93.

Profert and Oyer

It is a gen^{l} Rule at C.L. that when a party declares upon or pleads a deed & makes title under it. he must make Profert of it i.e. he must averr in his Dec^{n} that he brings the said Deed into Court. By making title under it, means. "making it the foundation of his demand or defence Com Dig Pr. R. La 96-7. see the form of a Profert in 3 Bl appendix 22.

Profert is required by the rules of pleading. that the adverse party may have oyer & a copy of it. i.e. may hear it read. & have a copy of it & also that the Court may command & inspect it if they please. 6 Co 38 10 Co 99. Hob 233. Com. Dig. Pr. R.

When the party ays upon the deed in his plead is entitled to oyer. he is not bound to answer or plead without oyer, & if he does answer without he waives it. Sal 119. 6 Mod 203.

But at C.L. Profert is never made of Bills of Exchange or of promisory notes, for they are not deeds on which the action is founded. but mere evidence of the parol promise Bunb 243. 2 Lit R. 185. Com: Dig. Pl: R. Law: 95. 7.

Profert & Oyer } In Com. Lawyer. from d Notes which are not negociable are, in practice declard on as Specialties. & Profert is made of them as of any other Deed.

If a party pleads a Deed in support of a right which would pass without Deed. & makes title under it he must make Profert of it.

But when the right would pass without Deed tho it were made by Deed. it may be pleaded without necessity of Profert. As in the assignment of a Lease. which tho made by Deed, he need not plead it, but if he pleads it & makes title under it he must make Profert. 5 Co 34 a.b. 1 Rols 119. 1 Lau 9 a.n. 3 Ch R 150. 2 Mod 64.

But if the party pleads the Deed without founding his title or defence on it, he need not make the Profert. & this is not inconsistent with the gen Rule. for he may plead the Deed by way of Inducement. as in the case 5 Co 38 a.b.

But a Stranger to a Deed may plead it without making Profert whether he claims title under it or not. Thus A made a Deed to B & B & C. & sues the Deed from A to B & makes title under it — he need not make the Profert. for he is supposed, not to have Possession of it. & the Law of a party must in common presumption he cannot perform 10 Co 94. 1 Ves 394. 3 Lev 80. 2 Show 418. Plow 149. 1 Lau 9 a.

So in gen one who acquires a right under a Deed by Operation of Law need not plead it in Profert. Thus Tenant of Dower, may by inducement plead the Deed to her late husband without Profert. for she cant command the Deed. it being in the hands of the Heir at law. but if it is necessary, will compell him to give it up as Evidence &c. Gunt 305. 1 Inst 225. 5 Co 75.

Exception of Tenant by Curtesy to this Rule. tho he claims by Operation of Law, still he is obliged to make Profert for he is supposed to have the Possession of his Wifes Deeds, 10 Co 94. 2 Rus. Conv

Profert & Oyer } Privies to the deed are bound to plead it with profert in all cases where the original parties would have been obliged so to do. Thus heirs at Law by privity of blood. Remainder man by privity of estate. Ex^r & Administrators by privity of Representation 1 Inst 2 P. 317. 10 Co 92. 94.

But he who pleads a Rec^d need not make profert of it even if it is a record of the same court in which he pleads. — the reason of this is, that the Record is not the property of any individual, & the public have a right to resp to them, & dest may do the same of course.

The usual mode of pleading the Record is. "ats by the said Rec^d here in this court remaining." A fortiori the party cannot be forced to make profert of the Rec^d of another court. Bul N P 252. 6 Mod 237. 1 Inst 225. Ld Ray 529. 1 Str 149. 1 Salk 96. Peak. Ev. 98.

So a deed or other private instrument which has been lost or destroyed by time or casualty may be pleaded without profert.

Rule is the same when the instrument pleaded is in the hands of the adverse party. But in both these last cases averment must be made of the reason why he does not make profert or his plea will be demurrable. As the Ct can not allow the absence of an essential from the record without the reason of this absence being therein specified. 5 Co 74-5, 3 Bl R 151. 1 Wils 16. 2 Str 1188 2 Atk 243. 10 Co 92-3:

You will find by looking into some of the Books that only remedy for the loss of the deed or its being in the hands of the adversary was by a bill in Chancery. but now there is no need of this. Hob 109. 1 Salk 14. 15. 3 Atk 17. 1 Ves 92.

And if the party whose deed was lost or in the hands of the adverse party, should inadvertently plead with a profert the opposite party would be entitled to the oyer, & not bound to demur until he should see it. In such a case the party

Pleads

Profert & Oyer. Pleading must entire a discontinuance until he is enabled to make oyer 1 Lun 92. 1 Wils 16. 3 BR. 193 a.

The inconvenience of this Rule has given rise to the modern practice, which allows the party to assign a reason why he does not make profert.

When the Deed is but inducement to the action or defence, profert of it need not be pleaded. And this comes under the gen Rule that profert need not be pleaded when no title is made under it. 2 BR 673. 10 Co 92. 6 Co 38.

In Lond. It was determined many years ago & has been ever since recognized that profert was not necessary in pleading. [illegible]

The only reason of pleading the profert is that oyer may be had. Now the Courts of Law have determined that oyer is demandable in all cases, in which the Ld required profert to be made, whether it is made or not. 1 Root 466.

Formerly in Eng. the omission of profert when it was necessary, was considered a defect of substance, & fatal on gen Demurrer; but now by St 14 & 15 Chs 2 & 4 & 5 & 6 Anne. it is cured only by special demurrer, & if the opposite party does not take advantage of the spec. Dem. he waives it. 6 Co 92. Hob 301 Co C 217. Hutt 54. 4 Bac 113.

When profert is made the opposite party may crave oyer of it, i.e. he may demand the reading of it (as the word imports) & he may also have a copy of it taken by the Proper officer at his own expence & for his own use. Hob 217. Lunes 95 3 BC 299.

But a party is not entitled to oyer, when the deed is pleaded with profert if the profert was unnecessary i.e. title is not made under it for it is mere surplusage. But if he pleads with profert when unnecessary & makes title under it, then

Profert & Oyer } When the opposite party is entitled to Oyer.
Sal 497. 2 Wils 293. Doug 476 7. Fid 529.

The granting or ordering of oyer by the Court when not demandable is not error. But the refusing it when it ought to be granted is error. Reason the compelling the delivery of the Deed to the adverse party, when it was not demandable deprives the party delivering of no advantage. - for he would be obliged to shew it in the trial at any rate. But continue the refusal of it subjects the party entitled to oyer to damages & deprives him of the advantage. Therefore it is error. Sal 498 1 Sam 96. But to avail himself of the error in this case, he must recite it on record with the denial or refusal of the Court Sal 498. 6 Mod 28. 2 Ray 969. 1 Sam 96 La 99.

When Oyer is granted the party obtaining it may enter the instrument verbatim on the Rec & so avail himself of any condition exception or fault or other thing not stated by the other party. & also of any variance between his pleadings & the inst. Thus in ac on penal bond. Def craves oyer, recites upon the Rec & avails himself of the condition. Shewing that he is not liable by it, so of any variance, & also of the illegality or insufficiency of the instrument. 3 Bl 299 6 Mod 28. 4 Bac 113.

Though if the inst. when recited appears illegal or insufficient, the party reciting it may demur. but this insuff. & must appear on the face of it. But if the illegality &c is extrinsic, he must make averment of it. 2 Wils 342.

But he who recites an inst. upon Oyer, must recite it correctly at his peril, - for he acts under an implied condition to do it correctly. And so his opponent may enter Judgt for the incorrectness, as for want of a Plea or nil dicit. & this is supported by shewing both the recital & original together to Court.

(4) Demur to the plea. for by the oyer the instrument is made part of the plea the in consequence of the misrecital. the plea becomes false & liable to Demurer. Lawes 90

Profert & Oyer

Another remedy for the misrecital is to have it to enroll in his Rep^r by the proper Officer & then demur. 1 Sh 227. 1 Sau 9 a. 316. 317. Cartt 201. 4 Br. 370. com Dig or Pl (a)

Departure.

Departure in Pleading is the declination from a former claim or defence for another distinct from the former & not fortifying it. This is a fault in pleading for each succeeding plea should fortify the preceding. as the Rep^r the Dec^n, the Rej^r the plea in Bar. v. 2 H 360. 1 Just 303, 304. Bull. N.P. 17. La 163.

Thus suppose Plff in Dec^n pleads foffment in fee. & in his Rej^r foffment by gift in tail. — The Rep^r does not support the Dec^n for it differs from it. He deserts his first title & sets up a second, therefore he fails for the first is the foundation of his suit. & this is a departure.

So if the mat alledged was good at C.L. & then he pleads a Custom &c. is Departure. Thus. Plff declares at C.L. on Indent. ure of Apprenticeship. & Deft pleads infancy which is a good bar at C.L. & Plff replies. Indent. made under the custom of London, (where the Indent. would be effectual) it is a departure 1 Lev 81. 1 Keb 376. 469. 512.

A plea asserting a right at C.L. is not justified by shewing a St. right. Thus if Plff pleads at C.L. & Deft pleads a good bar at C.L. Plff cant set up a St. right in his Rej^r 3 Lev 405. 4 Ba. 123.

But if one pleads a St. & the other replies it has been repealed & the former answers it is revived. there is no departure, for all he does is to fortify his Dec^n & he does not abandon his original right 1 Lev 81. 4 Bac: 123.

Departure } If in Covenant broken. Deft pleads performance generally. & then Plff shews a particular breach. to which rejoins, he was ready to perform that particular act but was prevented by Plff — it is a departure for he abandons his original position. to. wit. that he had performed all.

Or in an acc^n of Contract, Deft pleads Infancy. Plff replies a promise after age. Deft cant then set up a Release for it would be an abandonment of the original defence 1 Lid 10 1 Lutt 304a. Stk 442.

As to things Immaterial the Law does not recognise a departure, as a variance there is at most but mere matter of form, & no substantial departure Lal 222. 6 Mod 115. 2 Ba 125.

A Novel Assignment if properly made is no departure. this as observed before (page) is when, to matter prima facie good, in the Dec^n is alledged too generally, and an evasive plea is given. he states it more specifically by a novel assignment in the Repⁿ. It will indeed follows from the nature of novel assign^t. as it only states that part of substance in Repⁿ which in Decⁿ was but mat^r of aggravation. 3 Bl 311 — Bull N.P. 17. 3 Wils 20. 1 Saun 28n. 2 Saun 5a.b.

I will just observe by the by, (for the idea does not belong here) that when Plff makes a novel assignment he may state it as when the plea is or not as he pleases. 1 BR 479. 636. La 240.

A Departure vitiates the Plea as I conceive as well as a special Demurrer. this I state to be agreable both to the current of authority & to principle, tho the books are not at all clear upon the subject. Lal 221-222. Ray 217 224. Strange 422. Cro C 165 & 248.

Departure

A Departure is aided by verdict upon the qualification however that it appears upon the whole Record sufficient to entitle the party to Judgt. It certainly must be understood with this qualification for if the grounds of the verdict are immaterial, it of course cant prevail. Bacon post Roy 98. 1 Lev 110. 2 Sau 84. 1 Sau 117. Pid 689.

Why then it may be asked is it not aided by gen.l Dem.r? I answer. A Demr does not confess facts that are ill pleaded. Ex. in act on bon.l Deft pleads Infancy. Plff replies - necessaries. & Deft rejoins Release. Now if Plff demurs to this Plea it will vitiate the release. for the Plea is demurd to on account of the departure, & thus it does not confess the Release. — But if Plff joins issue upon the release & the Jury find a release Deft shall have Judgt. — for it is a full defence to the cause of action, & is apparent upon the record that it come there in a very unlawyer-like manner. "And this I take to be the principle though the books are not at all clear upon this point. 1 Lev 110. 1 Keb 556.

Demurrer

It is a little remarkable that there is not a proper definition of a Demurrer to be found in any of the books which I have ever read. tho there are several descriptions of it.

Wilson defines a Demurrer to be a denial of the legal sufficiency of the allegations demurred to. Wilson defines it to be an irregular or collateral answer to some part of the pleadings. While others (& I say it is an issue in Law & Demurrer then, admits such facts alledgd on the other side as are well pleaded, but denies their legal sufficiency to avail the opposite party. & then refers the question of Law to the Court. as contradistinguished from the

Demurrer } the Jury.

A Dem^r is distinguish'd from any Plea in this, that it adnances merely a legal proposition whereas a plea either Denies or affirms some matter of fact 3 Mod 314. 1 Saund. 716. Com Dig 6^th 2. & 25. Mod 233. 1 Sanc 338. 3 3.

In strictness then a Demurrer is no Plea, but rather an excuse for not pleading, as the very form of it denotes. The party demurring says that the matter pleaded by the other side is "in no wise sufficient in Law to maintain his action. to which he (the demurring) hath no necessity; neither is he obliged by the law of the land in any manner to answer" & this he is ready to verify" 3 Mod. 23-4. 2 Wils 292.

A Dem^r may be taken to any part of the pleading, either to the Decl^n, Plea in bar. Repl^n. Rej^r &c. 1 Saund 72a. 103a 129.

A Demurrer is either Gen^l or Special at C.L. admits no other facts than are well pleaded both in point of matter & form. But since the Sts 27 Eliz & 4-5 An. a gen^l Dem^r confesses all such informal defects allegations as are aided by those Sts & they aid all formal defects. 2a 167. (Mod 56. 233. C.L. Rules) 1 Sanc 338. Com Dig 6^th 2 5. 7. 103a 94-5.

A Gen^l Dem^r confesses those allegations which are good in substance tho' informal, but not those which are substantially defective. Thus in Covenant broken. Pltff alledges two grounds of claim, one well assigns, the other ill. informal Deft demurs generally to the whole Decl^n. Pltff will have Judgt only on the one well assigned. — But note the distinction of the allegation ill is ill only in point of form, it is confessed. but ill in both form & substance, it is not confessed, these last defects are reach by special demurrer. 1 Wils 248. Sal 214 2 Sanc 279. 280. Mod 56. 233. 1 Sid 10. 2a 167 to 169. Com Dig 6^th 2 3.

Demurrer

As to the Rule that a Dem^r does not confess facts ill pleaded. There must be understood a distinction. which is not to be met with in the books. — We dismiss the distinction between gen^l & special Demurrers.

Now a Demurrer must confess those facts which are ill pleaded. for arguments sake & for the purpose of saving the prec. of Law; whether the facts are sufft or not? but it does not confess them for the concluding of the party. Thus in acc^n on bond. Def^t pleads Release without writing, or by deed. to this Pltff Dem^r how the Release must first be admitted to raise the question of Law. whether the deed release is good or not? otherwise the Judges could not decide the question, but it is not so admitted as to conclude the party demurring.

For the same reason, a Dem^r never admits averments which, tho' contradictory appears certain upon the Record as one party having admitted the averment of the other, afterwards contradicts that averment. for the party is estopped to make it. 3 Lev 124. Cro Eliz 95. La 168.

Again it is said a Dem^r does not confess an averment of what is impossible. To this point we have no precedents, but it is undoubtedly true 1 Sid 10. Com Dig Pl 2 6. La 168.

A Dem^r never confesses facts on the Record which it seems are incapable of being legally proved. The averment of such facts, is of itself good cause of demurrer. As a Dem^r a gt matter of estoppel on the Record, will not confess the facts. 1 Sid 10 La 493

Allegations which are impertinent or not material are not confess'd by Dem^r. You will recollect such facts cannot be traversed, & what a party by the Rules of pleading cannot deny he does not admit, of course not by Demurrer. Sid 461. La 168.

Demurrer } A Demurrer does not admit conclusions of Law advanced as a deduction from the facts stated. — It admits the facts only. Thus in Bond, Plea Infancy "I do not his bond." Now here the Dem confesses the infancy but not that it was not his bond". for that the Court is to determine. Or in Ass. for Battery. Deft pleads a justification — as being an Officer "As he by law had a right to do". Dem here admits the fact but not the conclusion of Law Hob 56. 4 Ba 131.

After an issue in fact is joined there can be no demurrer by either side. for the issue closes the pleadings. The rule supposes the adding of the similiter which closes the pleadings, for a demurrer may be admitted before the adding the similiter 1 Show 213.

Mr Justice Blackstone observes that a Demurrer is an issue in Law. — This is incorrect for it only tenders an issue in Law. For suppose Deft demurs & says the Dec is insufficient in Law. No issue in law is closed tho there is a Dem. But when Pltf replies Dec is sufft in law, the issue in Law is then joined. 3 Bl 314-15. But Mr J. Bl. contradicts himself in page 313. see also 1 Inst 126 a Le 43. 4 Ba 54.

When an issue in fact & Law are both join'd in one case as they may be, the Dem is first tried, tho this is mere matter of practice & discretionary with the Court. 1 Inst 72 a. 126 b. Palm 517. 4 Ba 130.

It is a gen Rule that there can't be a Dem to a Dem, but the tender of it works a discontinuance for him who offers the second. Thus if Deft should Dem that Dec was insufficient in Law it would be nonsense for Pltf to reply that Deft Dem was insufft in Law. 2 Ray 30. Sal 219. Comb 306. La 172.

There is one exception to this Rule. It is laid down by Ld Holt in Comb 306, that when a Demurrer to a Plea in Abat.

Demurrer } A Plea in Abatement is not opposite it may be Demurred to. I formerly thought this position incorrect & indeed could not believe it possible & probably I have often observed so. but I was wrong. indeed it is at all time hazardous to deny the opinions of such a man as Ld Hale. There is one example of the rule & there is but one, & it is in 2 Ro Rep 253. Case. Deft demurred & Plead misnomer. Plff replied that said Lord had been by the name Deft was misnamed. & Deft demurred the said Lord upon the Rep & their Demurrer. Comb 306. Sal 22. 2 Ro 253. La 172.

But there is clearly no other exception to the gen rule & this is as clearly an anomaly.

For the form of a Dem^r see 3 Bl app 23. La 172.

In civil cases & in criminal short of felony.

Judgt on Demurrer, except when return to a plea in Abat., is peremptory, i.e. it is rendered in Chief, for the party put himself upon the question of Law. But it is often the case that the prosecutor from motives of humanity will suffer the crim^l to plead de novo, with the gen issue or special plea is lost after Judgt upon Dem^r but the Court never interferes. Gen^l 306. Dyer 69. 341. Cro C 196. 4 Bac 192. 11 Co 60. 2 Haw 334.

But in crim^l capital cases the humanity of the Law makes an exception. It allowes the crim^l to put himself upon the country, either by gen issue or special Plea in bar after Judgt of the Dem^r – this is an exception "in favorem vitæ" 4 Bl 334. 338. 2 Haw 334. Cro C 196. 2 Hale 239. 243. 257. 318. Hale contradicts himself.

Demurrers are of two kinds. General & Special. A Dem^r not assigning specially any cause of demurrer is general. On the other hand one which points out the particular defect on which it is founded is special. 1 Inst 72. 4 Bac 132. La 169-80

Demurrer } It is observed by Mr Lawes. That special pleading was introduced by St 27 E.3. This is material for us as some of the States may not have adopted this St. It is surprising how Mr Lawes should have so erred. for certainly all Demurrers are special & Ld Coke says in 1 Buls 67. That all Demurrers were not only always special but they always should be so — not meaning that the Law is so. 1 Vent 240. 1 Buls 67.

Thus much is true That there be 2 sorts of Demurrers special Demurrers necessary to reach certain defects in form which else were it could by C.L. be reached by gen demurr Hob 292. 1 Sau 277b. 1 Vent 240.

But to render the Demurrer special the cause of it must be specially assigned, merely assigning the cause of Demr renders it not special "If deft says the matter alledged on the other side is not sufft in Law for it is uncertain wants form or is double &c now here is a cause assigned but the Demurrer is gen; The fault must be assigned particularly or as Holt expresses it "you must put your finger on the point" Rule then is it must not only be declared double, but declared specially in what manner it is double. 1 Wils 219. Comb 297. 1 Show. 242. 2 Ray 1781

As to the Different effects of these two kinds of Demurrer it is to be observed that a special Demr reaches all defects which a gen Demr does. & some which it does not. for it reaches defects of mere form which a gen Demr does not; but all defects in substance are reached as well by one as the other.

A Defect in substance is as observed before, the omission of something which is of the ground of the action. As the omission of conversion in trover.

But by the Sts 27 Eliz 4 & 5 Ann. a defect in form is to be reached only by special Demr. But this is merely a St regulation

Demurrer } for at C.L. a gen.l Demurrer as effectual 10 Co 88. Latch 185. Str 824. 2 Wil 315. La 167 to 169. Com Dig Pr 2.5.5. See there the rule laid in 1 Ba 94-5

It is here to be observed that in all pleadings there are two requisites 1st that the matter pleaded be sufficient in Law. & 2d that it be alledged according to the forms of Law. — The want of either of these requisites is good cause of demurrer. The first is a substantial defect & was reach'd by gen.l Demr the second is a formal defect & so reach'd only by a special Demurrer 1 Lutw 303 304. Wms 164. 2 Str. 4 Ba 2. 2 Ray. 798. 902.

I am not certain that any definition will give you a clearer idea of substantial & formal defects & the distinction between them than the description before given. But I will add a few words more. If that without which the "very right" i.e. the ground of the title or defence, does not sufficiently appear, it is a substantial defect & cause of gen.l Demurrer

On the other hand If that without which the very right fails, does sufficiently appear, but is not alledged according to the forms of Law, it is a formal defect & cause of special Demurrer only. Any definition distinguishing between these two things must of necessity be general Wms 292-3.

I will give you cases of both these Defects. Suppose the right of Pltff or Deft depends upon a condition precedent & it does not sufficiently appear upon the Decl.n. — he is defeated by a gen.l Demurrer. as if he omits the consideration in Debt. — It is a sub.l defect &c. Now if it was not set forth how then it would be a formal defect. Agn in Slander he omits the words "were false & maliciously spoken" Agn where science is of the gist of the act as for the hitting of a Dog. & it is not alledged they are defects of substance. — But if these facts were alledged but not with sufficient certainty, particularity &c. they wd

Demurrer } would be formal defects & ground for special. Dem^r & for special demurrer only.

Formal defects. The Dem^r is double Is it a defect of substance or of form? Of form. for the fault is not that there is not sufficient matter, but that there is too much.

If there there is "any right" enough the defect must be in form. Thus in this Pltff omits to lay venue – it is in form. for it is enough in this. That Pltff assigns injury enough for the any right but the Rules of Pleading require venue to be laid in these act^s 4 Bac 2, 419. 134.

You will perceive that when the title wants substance no form will render it actionable. as for Holder. Dft calling Pltff a Jew or a Methodist; it is ill on gral Dem^r.

So if a Material allegation is omitted as connexion in Torts it is must'd as well by gral as special demurrer. 1 Just 72 a. Hob 133. 195. 232. 3 Ch 394. Cro Eliz 369. 1 Sid 184.

If the party pleads a fact which it appears on the face of the record he is estopped from pleading, it is a defect in substance & reach'd by gral Dem^r, for the objection is not to the form of the fault in which it is pleaded, but to the averment of it in any form. Wils 19. La 34. 140. 146. 155. 161. 170.

A Special Demurrer reaches no other formal defects than are specially assigned as the cause of demurrer & as to all these the Dem^r is general. Thus in this. ~~Demurrer to Dec^n~~ for duplicity & want of venue. & the Dem^r is taken upon the want of venue. This will destroy the Decl^n for it is such fault. but as to the duplicity the Dem^r is general & does not reach it. for it is not assigned as cause of Dem^r 10 Co 85.

Where formerly brought together in this place the rules as to the effect of a Judgt upon a Demurrer, but the rules do not

Demurrer } do not belong here but to the title of Evidence. Therefore I will give but one or two Gen[l] Rules.

1st If Judgt is rendered on a Demr to the Decr — that it is ill, no similar or concurrent writ can be brought upon the same ground of acc[n]. for a Judgt upon a Demurrer is as an effectual a bar, as a Judgt upon a plea to the action. 4 Ba 116. Cro Eliz 666. 6 Mod 307. 2 Ld Raym 827. Peak Evid 36. With respect to the distinctions & explanations under this rule it would be improper to introduce them here. for them see Evidence.

2d If Demurrer reaches back thro the whole record, to all issues in law &c. & attaches upon the first substantial defect in the pleading. So if the Demr is taken upon the Plea in bar, Repr or Rejr the Court will look back even to the Decr to see if there is any defect there, for the first defect is the fatal one. If there is a Demr ill & a plea in bar merely frivolous, which is Demurred to, Judgt will be rendered for Deft altho the Demr was taken to the Plea which was ill, for the Plea the bad is considered as good enough for a bad Decr

Again the Decr is good — Plea in bar, bad — Repr bad & Deft demurs to it. It will be considered as good enough for the bad Plea in bar, & Judgt rendered for Plff on the Plea in bar Com Dig Pl R 7. Sal 219. 1 Salk 218 n. Hob 56. 199. 200. 5 Co 32 b. 9 Co 110. 8 Co 120. 133. As to the mode of entering up Judgt see, Arrest of Judgt.

Exception. There is a single class of cases which do not correspond with the examples above given for Debt on penal bonds, for the performance of Covenants awards &c. Deft makes an insufficient plea in bar. & the Plff makes an insufficient Repr which Deft demurs to. & Judgt is rendered for him notwithstanding his bad plea. which was the first manifest breach. The Reason of this is that in these cases the Repr is considered but a supplement-

Demurrer } to the Dec^r. The Dec^n declares upon the penal part of the bond & the Resp^t upon the condition, & that the cause is not properly upon till after the Resp^t & that these are cases sui generis. & here the Plea the bond is considered as good enough for a bar Resp^t (3 Co 52. & it 120. Cro J 133. 221. L Ray 1050 2 Bals 94.) So that the fault is considered as a fault of the Dec^n

When under the St for Double pleading, two pleas are given to one Dec^n. If one of those pleas is judged suffic^t on demurrer. Deft shall have judgt, that the other should be judged for Plff. for one defence is suffic^t whereupon Plff shall be barred of his action Sav 80. 2 Bulst 749.

Demurrer to Evidence. I have thus far been treating of demurrers to the pleading, we come now to a Dem^r analogous to this, viz. Demurrer to Evidence.

In certain cases when the pleadings terminate in an issue in fact, one party may take the examination of the cause from the Jury & refer it to the Court. by demurring to the Evidence, which the adverse party brings to support his claim. This is a species of demurring which till very lately has not been understood 1 Just 72. Bull N P 13. Ray 404 Allen 18.

A Demurrer to the Evidence is always to be taken before any evidence has been advanced on the side of the party demurring. Unless he is willing to waive his evidence for the purpose of Demurring. 1 Rol 370.

This demurrer must always be taken to the whole of the evidence advanced by the other side in support of the issue, — For the whole evidence together may sometimes support the issue when a part will not. And it must be taken in relation to the evidence of that party only who takes the demurrer. Thus if a deed is given in evid.^e & D^t Deft thinks it insuffic^t

Demurrer } insufficient on the face of it he may demur to it either pro. and in evidence. 1 Inst 72a But I see no way in which Defts evidence can be demurred to. Contra 1 Inst 72a

I would premise before I proceed, that the Relevancy of Evidence is generally meere matter of Law for the Judges to determine. But its relevancy being determind the question how far it shall conduce to prove the issue is a question of fact for the Jury to decide.

It is for the want of attention to this simple rule that a vast multitude of demurrers to evidence have been set aside & the pleadings awarded. 2 Wms 205. Doug 3 6.

I observed that how far the evidence should affect the issue, is a question the Court can never decide, but it must go to the Jury. It follows then that it can never be proper to demur to the evidence as denying its relevancy to the whole issue, however weak the evidence may be. For the whole question of Law is whether it conduces at all to prove the issue. Thus if upon the person who takes the onus probandi, the necessity of proving two distinct facts fell, & he alledges evidence which goes to both. there is no cause of demurrer. Neither is there if the evidence evinces to proof of one of the facts only.

By Relevancy of the evidence then is meant, its conducing to prove in any degree the question in issue — It is not necessary for its relevancy that it should effectually prove the whole 2 Wms 205. Doug 119.

I ought to suggest to you that in speaking on this question; I speak not of the Admissibility of evidence for the Relevancy & admissibility of evidence are two distinct things the admissibility being a much more general term, for evidence may not be admitted on account of its being improper as being hearsay, under 11 Ed 2. when it would be relevant

Demurrer to Evid. } Now how are we to ascertain whether the evidence is relevant or not i.e. will conduce to the proof of the facts in issue or not? It must be decided by the good sense & judgement of the Court. 2 Atk 205.

A Dem to the Evidence puts an end to the question of facts & refers to the Judges the application of the Law to the facts shewn in Evidence.

It necessarily admits the facts shewn in evidence by the adverse party & like all other Demurrers denies their legal sufficiency 4 Ba 136, 1 Just 72, 2 Atk 205 & Doug 119.

Upon the Question under what circumstances is the Party by exhibiting the evidence obliged to join in the Demurrer the 1st Rule is. When the evidence is in writing. - for it is made certain & there can be no variance. And he must either join in the Demurrer or waive the evidence. Thus if Pff exhibits the Covenant in support of a Debt. Deft may demur but it is at his peril. But if the inst. is defective he may do it with safety. 5 Co 104 a. Cro C 751-2. 3 Ne 372. Bull N.P. 313. 1 Just 72 a.

The question how far the party exhibiting parol testimony is bound to join in the Demurrer to it is not definitely settled by the old authorities but is so by the modern authorities 1 Just 72 a. 5 Co 104. 1 Ld 87 Cro C 751-2.

Those opinions which hold that the party is not obliged to join in the Dem to this parol evidence, is on the ground that the evid. is not at all certain.

But the modern Rule settle the ques.

1st Rule. It is now settled & long has been, even on, that if the evidence is parol & both parties will agree to join in the Demurrer they may do it. Cro C 752.

Demurrer & Evid.e } 2d " If one of the parties would prove a fact by parol evidence. The other party by allowing it on the record may compell him exhibiting to join in the Demr to it. or waive it. Allen &c 2 Hill 208. — Ex If Offr in trover would introduce negligence by parol evidence to prove the conversion, Deft may admit the negligence on the record & then Demr. to the evid. however uncertain this evid. may be. And in all cases where part is uncertain & part plain, the part uncertain is admitted on a demurrer to the whole

3d " If the parol evidence advanced in support of the issue be certain. the opposite party by admitting it on the record to be true, may demur to it without further ceremony & compell the party producing it to join in the Demr or waive the evidence.

By the word "certain" is meant "direct & explicit as contradistinguished from circumstantial & indeterminate, 2 Hill 208 Now a part of the evidence offered in support of a justice is of this kind & he may demur.

4th " But if the evidence offered in support of the issue be indeterminate & circumstantial, the opposite party cant demur to it, without admitting it on the Rec.d to be direct & determinate as well as true. And by this admission, whether the evidence is written or parol, he compells the other to join in the demurrer or waive the evidence. Saunders pract. 5 Ed 104. 2 Hill 207. Bull N.P. 313.

But why it may be asked is it necessary to make this admission? Demurrer. For the reason that if it is not admitted on the Rec.d as precise & determinate, the fact testified to is not ascertained but is referred to the Court. (when it should be to the Jury). Thus a witness often testifies in Ct thus "I believe the fact to be so, this is my impression &c. & a scrupulous witness cant be compelled to be more explicit. & this is what is called loose & indeterminate

Demurrer to Evid^e } evidence. When such evidence is given in, the party demuring must admit it as the record as direct & determinate for if he does not thus recite it, as admitted, there is nothing on which the D^r can attach. for the evidence ascertains no fact, for witness says "I believe it is so & so". Therefore if the fact is not thus admitted Dem^r does nothing more than Demr to what the Witness believes it". "But admit it true & there is something on the face of the Rec^d for the Dem^r to attach upon

5 Pet^rs" If the evidence is circumstantial the party demuring must distinctly admit upon the Rec^d. every fact & every conclusion which it conduces to prove or the jury might infer. & indeed every advantage which the party exhibiting might derive from it. & had without this admission the opposite party is not obliged to join in the Demurrer. 1 Stiles 22, 24. Allen 18. Bull N.P. 313. Doug 114. 127. to 129. 2 Atk 207. 209.

I observed, that the party dem^r must admit every fact and every conclusion the jury could make in favor of the party exhibiting the evid. If it asked what these facts are? I answer that the jury could determine every conclusion which is relevant or which the opposite party offers to prove or claims. It is impossible to give a single example which will clearly explain the whole of the subject. The case in 2 Atk is this. An action was brought by indorsee agt the acceptor of a Bill of Exchange. Deft objected that the payee was fictitious. But claimed by Plff that if Deft knew at the time of the endorsement, that the payee was fictitious he should be bound by it. — But if there be a fictitious payee there can not be an indorsement so as to carry interest — & he offers in evidence a variety of circumstances to prove that he did know the payee was fictitious. To this evidence Deft demurred & the Ct held it was not demurrable, unless Deft admitted, that

Demurrer to Evid^ce. } 1. he knows the facts are fictitious, or admits the evidence conduced to prove, for without this admission there is nothing for the Dem^r to attach upon, & it would raise a question as to the truth & the weight of the evidence which cannot be allowed on Demurrer.

In all cases of this sort, when circumstantial evidence is introduced to establish some definite fact, If Dem^r be taken, the Dem^d must admits the facts or Judgt cannot be rendered but a venire de nov. ad must be awarded. Bull NP 313. 4 Ba & Ald 197. 2 B & Bl 209.

There are the 5 Rules which are established to regulate the Demurring to Evid^ce, & it will be found on examination that they are admirably with wonderful nicety for the exercise of Justice & to prevent any undue advantage being taken by either party. I also to permit Demurrers to Evid. in all cases, when introduced with sufficient nicety.

The point in issue in a Demurrer to Evidence, is, whether the evidence Demurred to is sufficient in Law to maintain the issue in fact. Here no advantage can be taken by this Dem^r of any Defect in the pleadings - for it does not reach them. But if there is any substantial defect in the pleadings advantage may be taken of it after the Demurrer is determined, by a motion in arrest of Judgt Doug 208. Bull NP 313.

The party whose evidence is Demurred to may always Demand the judgt of the Ct whether he is bound to join in the Dem^r or not. And the Court will not, neither ought it to allow a Dem^r to be taken to the evidence where there is no colourable cause or an evidence merely frivolous. For on Dem^r to Evidence joined the trial does not proceed but is carried to the Court above, so that if the Dem^r is admitted without a colourable cause a whole Term might be lost before a decision final is obtained

Demurrer to Evid.

On the joinder to Demr to evidence it is the practice to dismiss the jury immediately. If an enquiry as to damages afterwards arise, the jury afterwards decide it. But sometimes it is the prac. for the jury to determine the damages provisionally. The former is the usual practice Cro C 143. 2 Ray 60. Plow 410. 3 Sal 284. Dany 212. Bull N P 314. 2 Hill 200.

In the practice of Comm. if Damages are to be assessed after Dem to evid. decided it is done by the Court: this is a Regulation. So that in this State there is no mode of issuing a bill of exceptions as at C L. 1 Root 570 2 Swift 258.

If on article of improper evidence is admitted by the Judge, the party Demurring objecting can't demur, for that cause though he may to the whole. The Remedy in such cases is not by dem to the evid. but by a bill of Excepns or motion for a new trial Sal 284. Bull N P 314.

If a Dem to evidence is overruled by the Ct or it does not permit the party producing the evid. to join in the Dem, the Remedy is by a Bill of Excepns. For there is mere ly a mistake in interlocutory judgt the remedy to which is by a Bill of exceptn 9 Co 13 b. 1 Inst 426. Cro C 249. 2 Ld 741. 1 Ba 726. 4 Ba 136.

The whole proceeding in Dem to Evid. as the entering it on the Rec the admissions to be made & all the particulars of Practice, are under the Directions of the Court 2 Hill 208-9.

As to the Mode of entering the Dem to Evid, I say nothing. For you can see the forms in Bull N P 314. 2 Hill 200

As to the Conclusion, I only observe. I pray "that for want of sufft evid. that the jury may be discharged from giving a verdict. & then concludes in the usual form of Demurrers

Arrest of Judgement & Repleader

To arrest Judgt. is to stop or stay it — & it is done on motions reduced to writing & entered upon the Rec.

This proceeding is usually had only after an issue in fact & a verdict found. This however is not universally the case, as Judgt may be arrested after default suffered, & as we have just seen after a Demurr to Evidence 3 Bl 386. 393. Str 1271. 2 Bur 900. 208. 213.

It is a matter of consequence to understand the use & object of an arrest of Judgt. Now the principle on which it is founded & arrested in any case is this That the Judgt rendered by the court is a conclusion of Law from the facts ascertained upon the record. And as it must be rendered upon the whole record, he who is not entitled upon the whole record shall not have Judgt even tho' a verdict be rendered in his favr & this tho' the other party has defaulted, or, a demurrer to evidence has been determined against him E.g. A brings an action against B. but his Decl is radically defective. And Deft instead of demurring joins issue upon it. & a verdict is found agt him. Deft may here move in arrest of Judgt. for the verdict is found on the Decl which contains not cause of act. & tho' the jury find the facts to be true which are there alledged, still as those facts constitute no ground of act. Plff shall not have Judgt. It seems then that it is necessy for the cause of justice, that there should be some remedy for such faults as above. And this remedy is by arrest of Judgt.

The issue raised by a motion in arrt of Judgt is an issue in Law. It declares that the facts found by the Verdict are not sufft in Law, how Judgt can be arrested for intrinsic causes only i.e. such as appear on the face of the Record. Thus upon the Writ & Decl to differ substantially as the one sounding in tort the other in Contract. & Deft

Arrest. Judgt. Reply } pleads to the Writ & obtains Judgt, it may be arr?

again. When the Verdict varies materially from the Issue. Judt must be arrested, for in this case the issue is not found on either side & it is the only duty of the jury now, to find the issue, but here the facts that are not ascertained, 3 Bl 393.

Rule the same when the Decr is wholly insufficient & substantially defective, & the Plff obtains a verdict 3 Bl 393.

On the other hand. If Deft plea a bar on which he has obtaind a verdict discloses no legal defence to the acr Plff may arrest judgt if his Decr is good. Ex. is a acr of debt. Deft pleads not guilty. Plff instead of demuring joins the issue & the jury find Deft not guilty. Judgt may be arrested. for the Plff never said he was guilty so agn if Deft is cont. pleads he was always ready to perform. 3 Bla 395. Cro E 776.

Causes for which Judgement may be arrested. Judgt may be arrested after verdict for any cause that might be assigned after verdict & Judgt for error. — This is the Rule laid down in the books

& more simple one would be this & it is the one I would give. "If Judgt in pursuance of the verdict would be erroneous i.e. not by the rules of Law, it may be arrested on motion.

Whatever then would support a Writ of Error against him for whom the verdict was rendered, would on motion support an arrest of Judgt. — These three rules amount to the same thing Sal 77. 2 Rol 716.

In order to determine what would support a Writ of Error after verdict & Judgt rendered, take the following Rule. If the Statement (this is emphatical) of the Plff title or cause of acn, & that only is defective. the defect is aided by verdict & Judgt cannot be arrested. 3 Bl 394. Doug 655 & n 679

Arrest of Judgt & Repl^r { 671 Cro of Rochdale v Ashinall } Sal 365. Bull NP 320. Cro 825. Com Dig Pr Evy. Str 232. 1023. This however is so general I will give an illustration. In Tres. Plff in his Decl^n makes all the necessary allegations except assigning a day certain on which the Tres was committed. Now on Dem^r & even on genl Dem^r this Decl^n would be ill, but the omission will not support an arr. of Judgt. for the defect does not consist in not laying matter enough, but in not laying it in a proper manner. For the cause of acn is not defective but the statement of it, & the defect being in the statement only it will not support an arrest of Judgment.

But if the cause of action is defective or there is none at all it is not aided by verdict. E.gr. the Plff in Decl^n alledges a grant of an incorporeal hereditament by Parol, — Judgt may be arr. ted for the grant could not be made by Parol.

On the other hand by Slander, Deft calld Plff a Jew. This is not actionable & tho' it could any form of words with the utmost nicety under it wd — a Judgt may be arr^d for the defect is in the cause of acn.

Judgt in Tres. Plff does not alledge possession - as Tres. is the violation of a mans possession. So Conversion in Trover. Jud. arr^d Doug 655. 3 Bl 394. 1 Sid 184.

Judgt in Slander Plff does not alledge that the words were false & maliciously spoken. Judgt. arr^d. for unless they were false or maliciously spoken there can be no cause of act^n.

Thus for of the Declaration. But the same distinctions applies to the pleadings of Deft. mutatis mutandis. So if Slander fact is in substance he can't have Judgt. but if in form only he can — after verdict. exc^n of Delt. Dft pleads "not guilty" 3 R 395. Cro E 778. 1 Ro R 145. 545. 4 id 472. 7 id 518. 3 Burr 1728. Bul NP 320.

Arrest of Judgt. & Repl. &c. This distinction which I am now treating is particularly important, & it is wonderful it usually gives as much trouble to Students as the distinctions between a Tort upon a Tort. & a Tort after a Traverse. & as much to practitioners as to Students. —

It is a Genl Rule that any defect in the Pleadings which would support a motion in arrest of Judgt, must be such as would have been fatal on genl Demurrer. If then the defect is such as would not support a genl Demr it would not a motion in arrest. but the rule will not hold e converso 3 Bl 393-4. — For if the Decr or Declaration should omit some particular circumstance without the proving of which, or which could not be inferred from the facts proved, the party obtaining the verdict would not be entitled to obtain it. the defect though fatal on genl Demurrer would be aided by verdict. Case. Ejec. for taking Offs goods. without specifying the name, would be fatal at C L. on Demr but is aided by verdict. Le the omission of laying a day certain in tres. 4 Ba 196. Bro J 94. Carth 389. 3 Bl 394.

Now this defect of Certainty of the verdict curing these defects is no arbitrary rule but is a sound principle founded on the soundest sense. Thus the Jury find damages when none are laid in Decr, & the verdict is good. for the verdict supplies the omission of what by fair intendment arises from the facts proved. And this I suppose to be the governing principle as to the verdicts curing defects. Carth 94. 4 Ba 317. 10 Mod 301.

This being the ground then on which these pleadings are aided. the Court must necessarily suppose upon the rendering of the Verdict, that all those facts not alledged but which are implied have been proved to the satisfaction of the Jury

Invest of Judgt. & Repl^r Or in other words, the court must after verdict presume every thing proved in support of the plt in issue, which it is necessary should be proved, for without this the court would under judgt without sufficient reason. Bull N P 320. Doug 658. 1 Str 545. Str 1023 Cowp 827. 1 Wils 172.

If this governing principle is well understood, the doctrine of arrest of judgt & the distinctions taken in the books, are very easily understood.

The verdict supplies the omission & defects of the pleadings. Thus. in this Aff omits to lay a duty certain; which omission at C L would be ill on gen Demurr, but by verdict it is cured. Carth 389. Sal 662. 130. 3 Mod 94. 1 Bac 518. 1 Str 545. 4 Burr 2455. & judgt cant be arrested, for the verdict supplies the omission of those things which verdict alone

There is an example given to this point in many of our books which I conceive to be incorrect. "The pleading of profert without laying of vision. It is laid down by high authority & even by Buller that the omission of it is cured by verdict, & then it is implied from the profert. The rule is true so far that it is certainly aided against demurr by the verdict, but the omission is of no injury before verdict for it is implied from the profert see Buller's rule in 1 Str 145. 5 Bac 317. That it is good without verdict see 1 Lut 703 b. Cro J 411. Owen 149. & Cro E. La 48. Cro E 401 Com Dig Pl 9. There is no need of alledging laying of vision for the alledging of the profert is the alledging of the laying, as see Ray 487. Sal 170 1 Vent 109. 4 Mod 472. I thought this example proper to be laid down here, as a guard agt the error.

You will perceive then, that verdict aids the pleadings by ascertaining those facts which from the inaccuracy of the pleadings did not before appear.

Arrest of Judgt & Repl^r

On the other hand, no facts after the verdict can be presumed to be found, except those which are found or necessarily implied from them. Thus if the title and the cause of act^n appear to be defective, the defect cant be aided tho' a thing indispensible to the first cause of act^n (3 Burr 1728. 3 Wil 394. Doug Rep. 638.) In Slander for calling Pltff a Jew. Should Pltff have a verdict and end in his favor he could not have judgt for the words are not actionable, & the Court cant presume Defts meant to call him a thief or the like

So where there is any fact omitted wh is essential to the cause of act^n & it is not inferable from the facts stated & found it is not aided by verdict. (Doc and Stat 365. 1 Bac 145.) Eg gr Pltff in act^n omits to aver the performance of a condition precedent, ex. D agrees to pay A (the Pltff) £1000, if A would build him a house in a given time; Now if the condition not being avd the jury find a verdict for the Pltff ex. what do they find? That there was a contract & that Deft had not paid the money. but not that Pltff had performed his condition i.e. built the house. Nothing can this be inferred, for the facts proved do not touch the fact omitted.

In an act^n brought against the Indorser of a Bill of Exchange the Pltff does not allege notice to Deft of the dishonor of the Note it is error. Doug 679. 654. 2 Bac 10. 2 Burr 900. 1 Bac 645. 4 id 472. 7 id 125. 4 id 127-8. 2 Bac 574. 3 Stat 12. The ind^r must have notice or the Law will not raise act^n.

Illustrations of this matter might be carried on almost ad infinitum, but I presume the above are sufficient.

It is here material to be observed that the Court cant upon pain ^ presume the existence of any facts, because their existence is necessary in point of Law to warrant a verdict. And this

Arrest of Judgt & Repl } is all important to be observed. but they are
obliged, by necessity implied from the facts found by the
verdict. but the former presumptions can be accounted for
on the idea that the Jury are Judges of the Law. whereas the
principle on which arrest of Judgt is founded is directly the con-
trary

Still there are some cases where the former presumptions
has been held as Law. in case of apt. Pl. laid no consideration
& obtained a Verdict, how consideration is not inferable from the
facts found or alledged. but it is necessary in Court of Law
that there should be a consideration. It was held to be implied

In Cor. the
same principle has been acknowledged. The Court held that because
a parol obligation was not binding without consideration, it is in-
ferred that the jury would not give a verdict without this consid-
eration being proved to them. — But the decision is contra-
ry to all Law. see the prin. in 1 Vent 27. 7 JR 951.

I have before ob-
served (pa) that a Motion in Arrest is generally made after
verdict. It may be also had after default suffered & has been
noticed after Demr to evid. decided. Its operation after Default
is precisely like a general Demr, & like a Demr there is no trial
no verdict, & the issue is the same as that raised by a genl Demr
so the rules applicable to the foregoing objections taken to
Judgt after verdict, do not apply here. 1 Wils 171. 2 Burr 900. 2 St
1271.

There are cases however where Judgt can never be arrested for
the greatest faults & these nothing is cured by verdict. The Rule held in all
cases where the first radical defect is on the side of him who moves
in arrest. — for the Judgt must be rendered upon the whole Rec
-d & if in this case Judgt should be arrested, & would answer as to anoth-

Arrest of Judgt & Repler } for that judgt would again have to be
arrested immediately.

If the Verdict be in favor of him upon whom the whole Decl. appears to be entitled to judgt. he will have judgt however faulty his Plea may be on which the issue was taken. Thus Suppose the Decl to be radically defective as that not alledging conversion in Trover, or Possession in his pltf. & Defts Plea is to be merely of visitors & no defence to any cause of Action issue taken on it & verdict rendered for Defdt. Pltf cant move in arrest of judgt. for the Plea was good enough for his bad Decln & the first radical fault was on the side of Pltff.

Suppose the Decln is good. but Plea & Repln both bad. Issue is taken on the latter & verdict found for for Defdt. - the radical defect was on his side. ergo judgt should be arrested. Hob 56. 199. 2 Rep 191. 180. 181, & Co 120. 133. 9 Co 110. 3 Lev 244.

There are some cases in which when judgt is arrested; it may be entered up directly opposed to him for whom the verdict is found: This is different from any thing which has occured before, for in general the arrest of Judgt for one side does not give it to the other as in these cases.

The Genl Rule here is that judgt is to be rendered for him who appears entitled to it upon the whole Decln. hence if the party upon whom the verdict is found appears upon the whole not to be entitled to judgt he must have it notwithstanding the verdict. (last cases.) Case The Decln wholy insufficient & the issue is taken upon the Plea. no matter whether it is good or bad & verdict is found for Pltff. now judgt must be entered for Defdt for the Pltff found action for his suit was good for nothing.

Suppose the Decln good, Plea wholly insufficient, Repln good or bad - no matter which. & verdict for Defdt. Judgt must be arrested, & entered up for Pltff. Hob 56. 199. 200. & Co 120. 173. 1 Burr

Arrest / Judgt & Repl^r } 1 Ver 301 to 306

I have heretofore been treating of issues on material points, such as would make the title or defence good. It is my important to distinguish between these & those taken upon an Immaterial point.

Where the issue is taken upon an immaterial part of the Dec^n when the whole is good, Judgt can't be rendered, but must be arrested & a Repleader awarded, for the verdict can here form no base for a judgt to be founded upon. If Dff would take issue upon an immaterial part of a good plea in bar, & should obtain a verdict the Judgt wod be arrested & a Repl^r awarded, but Dff can't take Judgt for himself. for Plff in his Dec^n had discovered a good cause of a^n, 2 Sau 319. 2 Mod 137. Cro J 434. 5 Mo 85. Sal 569. 1 Sau 228 n 1

Dg^r pleads Sp^l agt Plff as such, who demurs that he (instead of this) had made no such promise, & Verdict found for him. Judgt to be arrested & Repl^r awarded, for the Dec^n was good, but the plea was on an immaterial point. When such errors occur they are supposed to be mere blunders & are called such & mispaisons. To prevent a delay of justice the Court will sometimes allow a double issue

3 Bl 395
Cro J. 434
1 Sau 228 n 1

Dg^r in act^n agt Husband & Wife for a tort committed by the wife when sole. & Defts plead that they are not guilty. & verdict is found for them. Repl^r is awarded for Plff had insufficient Dec^n 2 La 176. 4 Ba 27.

You perceive the ground on which a Repl^r is awarded is, that the Court can't discern upon the Rec^d for whom the Judgt should be rendered.

Here agn note the distinctions between an issue on an immaterial point & on a Dec^n wholly insufficient.

For suppose the Dec^n to be wholly insufficient in that

Arrest of Judgt & Repl } no issue could be taken on it. & a verdict is found for Plff. the Deft arrests & enters judgt for himself.

But if the Plea is bad & Deen is good & verdict is found for Deft. Plff may arrest & enter Judgt. Whereas if the Plea had been good & an issue had been taken on a immaterial point a Repl would have been awarded

Now when the pleads on one side are wholly bad, the issue is not call'd immaterial, but it is that name only when there is matter in the Declaration which a material issue might be founded. Assumpsit on an obligation payable on or before a day certain. Deft pleads it was paid before the day. the issue is immaterial & on a verdict being found for Plff a Repl would be awarded, for he might have paid on the day. 2 Bur 944. Str 994.

This example leads me to observe that an issue, which is found are may be material may if found the other be sometimes immaterial. As in the case above. Deft pleads he paid before the day. & Plff joins issue. if the issue is found for Plff it is immaterial & a Repl would be awarded Whereas if it is found for Deft it would be material & decisive.

In such case

it is held in all cases when the Ct cant from the verdict & the Record give judgt a Repl must be awarded. Cro E 245. Cro J 5. La 175-6. 2 Ray 707. Ray 458. 1 Bur 301 & 305. 3 Mo 395. 2 Sam 219 n. Str 994.

A Repl then is never awarded where there is any manner of joining the issue which would make the verdict material. That is it cant be found by any way of joining the issue. & the Plea is totally defective & no issue taken on the point would decide the question, or would be decided by the verdict 1 Bur 301. & Ld 120. 1336. 4 Bur 2130. Str 994. Wms 96. 199. 2 vol.

These leading distinctions might be pursued thro' the whole train of special pleading, even to a nonsuit.

When a Repl is awarded, the Pleadings begin de novo, & at that stage of them at which the first deviation from

Arrest of Judgt & Repl^r } the Rules of Pleading examind. So if the Issue was taken on an immaterial part of the Dec^n & a Repleader is awarded the Pleadings recommence on the part of Deft. & he then has a Opportunity to take a material Issue

It is said in one case that if the Dec^n is ill the Pleadings begin at the beginning, but I cant see why this should be the case, for an amendment is altogether a different thing from a Repleader. 3 Mod 295. Sal 579 179. 216. 1 Bac 301 to 305. 2 Sand 319b.

And it seems that a Repl^r is never awarded for the immateriality of the Issue in favor of the party who answered it. Thus if Plff should tender an Issue on an immaterial part of a good Plea in bar, & verdict should be found against him on that Issue, no repleader could be awarded; but if the Issue should be found agt Deft. a Repl^r would then be awarded. 1 Sand 308. 2 Sand 319. Doug 308. Com 500. & 501. 1 Atk 544.

An Issue may be immaterial when found one way which if found the other would be material. As in the case above is Debt on bond payable on or before a day certain. Defendant pleads payt before the day, this Plea traversed by Plff. & if it be found Plff the Issue is immaterial for Deft might have paid on the day & have fulfill'd his contract. but if found for Deft the Issue would be material, & decision in the first case Judgt would be arrested & a Repl^r awarded, but not in the 2d. 2 Bur 944. 2 Wils 179. Com Rep 144. 4 Ba 66.

A Repl^r is never awarded after a Dem^r, & never except after an Issue in fact. — for an Issue in fact may be immaterial but an Issue in Law can never be so, for it reaches back thro' the whole Rec^d confessing all that is Demurd to & denying the legal sufficiency. 5 Co 52. Poph 42. Latch 148. 5 Mod 104. This is settled Law but you may see a contra opinion in 3 Lev 20, 440.

If a Repl^r is awarded when it ought to be denied, or denied when it ought to be granted it is Error. Sal 579. 6 Mod 2,

Arrest of Judgt & Repl^r

After Default or Discontinuance there can be no Repl^r — for after Deft has suffered a default Plff cant wish to reduced. & Deft is out of court. the same with a discontinuance. & in neith of these cases can there be an issue on which the judgt of the Ct could be erroneous Cartt 329. Sal 579. 6 Mod 3.

A C.L. where in general nothing was aided by verdict a Repl^r could be amended before trial. but under the St of Jeofails, as the verdict cures immaterial issues & many many defects of the pleadings, the Ct will under the trial to proceed, & leave the defects to be cured by it. — But where the fault is so helpably incurable, that there is no doubt as to it, a Repl^r may of the discretion of the court be awarded, before the trial 1 Ba 90. 103. 2 Keeb 664. + Bur 6. Mod 2. 1 Lev 32. Cartt 371. Sal 579.

I have been thus far upon considering Arrests of Judgt & Repleaders for defects in the pleadings. But judgt may sometimes be arrested & Repleaders awarded for defects in the verdict. As the jury finding an part of the issue only & omitting something material, in which case Judt arrested & a venire de novo awarded. For it is the duty of the jury to find the issue only, on one side or the other. Here is no need of a Repl^r for the defect is not in the pleading but in the Verdict. 5 Ba 296. Cas t 103. 3 Lev 82. 2 Ray 1521; Stra 844 1089. 1 Salk 227.

A if is a special verdict, the jury find only the evidence of the material fact & not the fact itself either way. Judgt must be arrested & a venire &c awarded. As in case the jury find in a special verdict, that the property was the Plffs, & it came into Deffs hands who would not return it, without finding the conversion, but only evidence of it only. 2 Bur 1243. 1 Salk 111.

The Law however does not require the verdict to be found in the precise words of the issue,

Arrest of Judgt & Repl } for if the substance of it is found either way it is good & sufficient 1 Sant 227. 1 Vent 27. 12 Mod 5.

But a verdict wh ich finds the substance of the issue is not vitiated by the finding more. for this exceps is considered but as surplusage & "utile per inutile non vitiatur". 5 Ba & 97. to 299. 2 Rol Rep 176. 6 Co 57. Cro J 407.

If the Jury find a fact specially & then draw a conclusion of their own from it, the court is not bound by, neither are they to, regard the conclusion. for the Ct are to give judgt on those facts only which are found. Thus in a special verdict, the Jury find a fact & then conclude (in a question of pleading) that "thus J.S. died seized in fee", the Ct will give judgt as of the seisin 5 Ba & 85. 11 Co 10. Rol 60. 56. Dyer 362.

If in a civil act there are two counts the one good & the other substantially ill. & the Jury find entire damages in a general verdict Judgt must be ar? & a remire de novo awarded. for the Ct cant ascertain from the verdict, on which of the counts the damages are assessed. 10 Co 130. But Noys & Wilk 377. 1 Ro 508. 532. Dany 362. 2 Wms 218. 1 Bl & P 329.

And yet in this case the Dec is good on Demurr, though after verdict Judgt will be arrested. And this is not inconsistent with the rule laid down above that Judgt can be arrested only on good cause of Demurr. — for there there is one good count & cause of act. & the defect is not in the pleadings but in the verdict.

I have lately learnt with some surprize, that our Court of Errors will not in this case arrest the Judgt but allow the Plff to have it. which is equivalent to saying the Jury are Judges of the Law.

But if Nominal Damages are assessed on both Counts. Plff may release them found on the bad count & take

Arrest of Judgt & Repl^r } judgt on the other — for he is entitled to Judgt on the good count.

But the entire damages on a gen^l verdict are aspesid when the one count is good & the other bad, & no evidence was alledged on the trial to support the bad, — the verdict may be amended from the Judges notes so as to apply to the good count only. for it is not to be presumed that the Jury would give damages without any evidence 5 Co 513, 585. 1 Lev 134. Doug 362.

When Judgt is asserted for an improvous aspesment of damages or any other part of the verdict, a venire de novo is awarded, but no Repl^r. for a Repl^r would be unnecessary, the defect not being in the pleading but in the verdict. So that a new jury must be empanelled & the cause tried again Doug 262. 8 DR 564.

In criminal prosecutions if there is one count good & one bad & a general verdict of guilty found, Judgt is not nette would it be asserted, — for the Jury in these cases never by a fine, aspess damages or inflict a punishment, but this is all done by the court who are supposed to know the difference between a good count & a bad one & of course will give Judgt only on the good one 2 Bro 985, Doug 703. 2 Mau 627. Sal 374. 2 Ray 886.

I observed early under this division (Arr. Judgt) that at C L Judgts are asserted only for intrinsic causes. But in Conn they are asserted for extrinsic causes as well as for intrinsic causes. This to a professor of C L would appear strange, but it is right. The same thing is done in Eng but in a different way. There the Judge at N.P. enters the the cause upon the postea so that the court alone may have advantage of it on the rec^d & if it does not appear on the postea if tried at N.P. or on the Rec^d if at bar, the ct alone will not set aside the verdict

Arrest of Judgt & Repl" } the difference is that there the judge before whom the cause is tried can decide the motions for arrest. & hence can, for that which was extrinsic was made intrinsic Kirk 13, 133 184.

Again. in Eng. Judgt may be arrested for the misconduct of the party towards the Jury, as tampering with them, attempt at bribery &c. but the misconduct is noted on the postea by Judge & NB. & it then goes to the K. alone, on motion of arrest when it is decided not as with us by the inferior ct. 5 Bac 291. 3 Wm 142. 1 Vent 127. 1 Just 227.

If one of the Jurors is interested in the issue or so related to the prevailing party or his laid as to form a ground of a principle challenge, Judgt is to be arrested. Kirk 184. 279

That one of the Jurors had been an arbitrator or an atty or had given his opinion in the cause is a suff ground of arrest of Judgt, — for all these objections go to his impartiality Kirk 166.

And it is a good rule that any incompetency which goes to the impartiality of the Jury is a ground for a principle challenge & cause of arrest of Judgt Kirk 13. 133. 184.

But any incompetency in a Jury which would not raise a presumption of partiality is not cause of arrest. As the want of a freehold which is a requisite of a Juror, is not cause of arrest after verdict, tho' it is ~~cause~~ ground of a challenge - but relation which goes to his impartiality & is therefore good cause of arrest Kirk 184

And tho' the incompetency is such as would raise the presumption of ~~in~~partiality, still if the party against whom the verdict is found knew the fact in time to have made the challenge & had omitted it, he is supposed to waive the

Assent of Jud & Repl^r } the objection. But if he did not know
of the incompetency it would be cause of assent. Kirb 168. 2 Swift 232

Since if one of the Jurors who tried
the issue had been on a Jury before at a trial of the same cause
in an inferior Court, it does not assent. Yet the circumstance
would have been ground of challenge, for the fact that he was
a juror on the former trial appears on the record, & there he might
have seen it. Therefore the Ct will not excuse his negligence in
not seeing it. 2 Swift 232. Kirby 160.

Those in Law assent for extrinsic cau-
ses, the Ct can never go into the evidence, & review the testimony on
which the verdict was found, & no decide over the heads of the Jury
Kirby 61. 87. 142. 279. 277.

When the Judgt is assented for the mis beha-
viour of the Jurors or of the party a venire de novo is awarded
but no Repl^r tho' the contrary opinion has been laid down
by Mr Swift — 2 Swift 264. 1 Root 573.

I have observed that verdicts are
set aside in Eq. for extrinsic causes, but in a different way
from what we do it. i.e. by the Judge at nisi prius certifying the
facts upon the motion & sending them to the Court above. for
this practice of Eq see 5 Ba 288. 291. 292. Bunb 31. Stra 642.

There are
however two cases of Eq Jurisd. where Judgt has been asserted
in our way, tho' much more loosely. which was by affidavits
being made of the circumstances, whereas we do it by the ex-
aminations of witnesses in open Court. 5 Ba 291. 250. 1 Vern. 79.

In these
cases however where the complaint agt the verdict is founded
on extrinsic causes, the motion for a new trial is in Eq. a con-
current remedy & the most usual way 5 Ba 250

No 12

Arrest of Jud'gt & Repl'r } When Jud'gt is arrested for a defect in the Plead's no costs are awarded to either side, for the Party might have demured & so have prevented the trouble & expence of a trial. & if he would not stop the expence, he shall not be paid for it Sal 579. 2 Vent 196. 1 Bac 257. Com 407. Str 619. Mich 89. 1 Roll R 69. 70. 572.

The rule is the same when the party moving an arrest fails & afterwards brings a Writ of Error & finally prevails, & for the same reason he might have demured. & regularly no costs are awarded to Plff in error, for costs are in the nature of a penalty; & here Deft in error is not in fault therefore he shall be punished 1 Chit 637 & 639.

In Com. the rule does not apply to arrests for extrinsic causes when a venire de novo is awarded, there tho on a second trial the whole costs follow the final Jud'gt. for the party could not take on earlier advantage 1 Roll R 417. 572.

In Eng motions in arrest of Jud'gt are made within the four first Days of the term next succeeding the trial & this is what is called "the Rule". But should the last of these four Days fall on Sun Day, the Monday following takes its place 3 Bl 393.

In Com. the motion in arrest is made on the acceptance of the verdict, & it must be reduced to writing a copy of which read with the adverse party or with the Clerk, within 24 hours according to the old rule, or as it now is within 48 hours. Kirby 235, 1 Roll R 572.

Finis.

No 1

Bills of Exceptions & Writs of Error

A Bill of Exceptions is a statement of certain facts & of some interlocutory judgt founded on them which one of the party thinks erroneous annexed to the Record for the purpose of laying a foundation for a Writ of Error. These facts did not originally appear upon the Record

It is called a "Bill of Exceptions" because it contains exceptions to the interlocutory judgt complained of 3 Bl 372. 1 Ba 325. 9 Co 138.

This mode of founding Error was unknown at C.L. but was introduced by St of West 2, 13 Ed 1. & therefore is a creature of that St. in anc. & Bull NP. 315: & Rex v Ble 324.

We have in Conn. no St of this kind, but our Courts have adopted this St of West 2. And indeed this is one of those ancient Sts that are prima facie considered as part of the C.L. Kirby 168.

A Bill of Except. cant be filed in a Ct from whose Judgts a writ of error does not lie, — for the sole object of a bill of exc. is to lay a foundation for a Writ of Error. Bill cant be filed in a Ct not of Record Bull NP 315. 1 Ba 327.

It may be filed there in any Ct whose judgts are liable to be reviewed in error. Thus in Con. Justice courts for they are Cts of record, & so in County Cts viz the Supreme Courts. & in Eng in the C.P. Exchequer. & K.B. tho there is some doubt as to the latter, for there the causes are supposed to be tried before the King

But I take it to be the case that they can be filed in K.B. as well as in any other Court. 1 Ba 326. Skinn. 356. 2 Lev 237. 2 Show 147. 287. Bull NP. 315. Kirby 289.

Bills of Excep^{ns}.

As to the causes for which a Bill of ex. may be filed, one is (which is mentioned in Pl. & Plead.) when a party demurs to evidence & is improperly overruled by the court. his remedy is by a bill of ex. 1 Ba 325. 9 Co 136. Cro C 249. 341.

2. If his direction in point of Law given by the Ct to the jury. is a subject for a bill of ex. & in this way the judgt may be reviewed, but the much more usual way to effect this purpose is by motion for a new trial 2 Bibb 255. 1 Bv 564-5. 2 Mo 21.

3. If evidence which is objected to is admitted by the Ct or rejected, the unsuccessful party may file a bill of ex. to this interlocutory judgt. but here the more usual course is to move for a new trial 2 Lew 297. Bull N.P. 316. 1 Ba 325. Kirb. 168?

But when the judge admits evidence objected to, a bill of ex. cant be filed because he did not direct or charge the jury how to find upon it, neither could it be filed if he cannot notice the evidence at all, for it is not his duty to direct the jury to the same in every case. So in case a Rec^{d} being produced in evidence, which is the strongest case, a bill of ex cant be filed because the judge did not tell the jury it was conclusive. But if he misdirected the jury as even alone the bill could be filed Roy 405. Bull N.P. 315? 1 Ba 325

4th Power is refused when in the opinion of the party claiming it, it would be granted or vice versa, the unsuccessful party may file the Bill.

I find this Rule so laid down in the books. But the latter part of the rule I dont think is Law. as we have seen under the title of Plead page for the reason, that the party is forced to produce the Deed only a little earlier than he otherwise would be, & is deprived of no advantage. For the instrument-

Bills of Exep. } must be produced on the trial 1 Ba 325. Dyer 271
Ray 486. 2 Swt. 427.

But to an interlocutory judgt relating to mere practice a bill of ex. cannot be allowed, — for there is no principle of Law involved in the determination, therefore no error. Thus on motion for the continuance of the cause being decided agt him making the motion & vice versa. 2 Va a party is compelled to plead at an earlier time than he thinks right & vice versa. 3 Va on the Ct ordering a bond to be taken to secure costs when the party thinks it ought not to be demanded or is refused when it is thought it ought to be ordered, Bills of exep. cannot be filed.

As a gen[l] Rule when the decisions of the Court, of any kind, is discretionary, a bill of ex. cannot be allowed, as in all the last cases.

Under the same principle a bill of ex. will not lie for the refusal to grant a new trial; for this is discretionary with the Ct. and so when they grant a new trial on terms, the party receiving it has no right to complain of their exorbitancy. Bull NP. 316. Kirk 41. 1 Ba 327. 1 Root 290.

I conclude however if the Ct should grant a new trial under circumstances in the nature of which a new trial in no case could be granted — error wd. be predicable on the decision, as in crim[l] cases capital, when a second trial is prohibited by Law, for here the court has no power to grant or refuse it discretionary — which is supposed under the gen[l] Rule. Or by a Ct which has no power to grant a new trial as justice &c. it is error without doubt —

The Rule then that error is not predicable when the subject is at the discretion of the Ct must

Bills of Excep. } must be taken with this qualifications.

The case

cases where a new trial at C.L cannot be granted on either side, as
in crim. cases for felony & treason, — never for the prisoner &
much less for the crown." But it shall not be granted for the crown
is bcaus the benignity of the Law, which never suffers the prisoner
to be tried twice for his life for the same crime. But the con-
tra reason is not so obvious, but is rather extraordinary, bcaus
the Judges are supposed to act as council for the prisoner &
therefore will not suffer injustice to be done him. which goes
on the ground that the K cannot err, whereas a bill of exceptions
is on the ground of their liability to error. The true
reason is, that they are not authorised by the K of West 2 to
grant a new trial, which it introduced the bills of exceptions
1 Sid 84. 1 Lev 68. 1 Kel 324. Ray 486. Keyl 15. 1 McMaly 325.

Another reason that a new trial cannot be granted in these
cases of treason & felony, is that a second trial is never allowed.
— More of this under the head "New Trials.

But it is Law is clear.
& has been so decided in the U.S. Circuit Courts that in some cases a new
trial may be granted for the prisoner, tho' never agt him, and I there
fore can see no reason why a bill of exceptions may not be allowed in
his favour, but certainly it cannot against him

Whether a bill of exceps.
will lie on an indictment for misdemeanours or offences not treas.
itable, or not, is much disputed, though there is a class of cases
in which it has always been allowed i.e. libels, & I see no reason
why it should not be allowed in the cases of misdemeanours. or offences
below felony 1 Bac 325. 2 Haw 428. 1 Leon 5. 1 Vent 366. Bull NP 316
1 Lev 68. Keyl 15. 1 McMaly 326-7. Kirby 269.

From the rule regarding libels. I would conclude that bills

(c) And when thus certified by the seal of the Judge the minute of the exception can never afterwards be doubted, for the adverse party is concluded from averring the contrary or suggesting an omission in it. Mary. Ds 466.

Bills of Excep } bills of exception may be allowed in case of misdemeanour for the prisoner. but I doubt whether they will lie agt him

When a bill &c is allowed the Ct will not regularly allow the party to move in arrest of judgt on the same ground - for the Ct have once given their opinion in allowing the bill &c. but this has sometimes been disputed 1 Ba 327. 2 Lev 237. 1 Vent 366.

In the practice of Con. it would be absurd to move in arrest of the grant of a bill of exceptions. for it would be decided by the same Ct who had before decided the question, the remedy is by his writ of error for which he has laid a foundation by his bill of excep. 1 Bull N.P. 316. 1 Vent 366. 2 Lev 237. 1 Ba 327

As the object of a bill of excep. is to draw before a higher Ct judgt on some collateral point, it can't regularly embrace the general merits of the cause, therefore a general statement of the evidence, arguments &c would be improper. In Con Bills above have abated the writ of error when this has been attempted. Bull NP 316. Con 161. 6 TR 549. 1 Morg Ess. 466. 2 Swift 276.

The bill of ex, is authenticated in Eng by the signature of the Judge or Judges as the case may be before whom the cause was tried, & the Judge or Judges (c) whose signature is annexed appears in the higher Ct & acknowledge their seals. & in this manner the bill is certified to the Ct above 1 B & P 32. Con 161. 1 Ba 325-326.

In our practice in Con. the Bill &c becomes a part of the original record & being entered in extenso in the rept of the Rec'd by the proper officer i.e. the Clerk of the Ct. It must contain a statement of the interlocutory judgt & the facts on wh it is founded, I don't mean all the facts, but those only on which this particular determination was founded. As the admission of a witness who was objected to, the admission is the fact

Bills of Exceptions

If the facts are truly certified in the bill the Judges are bound to certify it of course — but they are not bound to certify any bill counsell may think fit to present. for it is their duty to examine & determine whether it is correct or not. Bull NP 315. 1 Ba 326.

If the Judge or Judges refuse to certify a bill of ex. a writ lies against him or them in the K. of West 2. commanding him or them to do it. This of course is in the nature of a Mandamus. 2 Lev 237. Bul NP 316. 1 Ba 326.

Your practice the bill is certified by the Chief Justice or in his absence by the presiding Judge of the Court. But the Supr Ct some years ago made a rule that no bill of ex. should be certified in that Ct. but remedy should be sought by a motion for a new trial. I have could ascertain by what authority or right they made this rule, but it has ever been acquiesced in & therefore now is an established rule of that Court. & I am much inclined to believe the rule a very good one. It is pretended to have been made under the St authorizing them to make rules of prac but I contend that the authority would reach so far.

In Eng the bill or the substance of it reduced to writing must be tendered to the Judges at the trial 2 Sal 285. 1 Wolf 501. Bull NP 315.

In Con. the party who proposes to except must give notice of his intention to file the bill at the time of deciding upon the objections, & it being reduced to writing must be presented to the Ct or presiding Judge within 24 hours. or as I believe the rule now to be within 48 hours after the judgt if the cause was tried by the jury & within the same time after Judgt if tried by the Court. & it must always be before the rising of the Ct. Sundays are excluded from this computation. 1 Root 569. 570. 2 Litt 276.

Bills of Exceptions } In Com. it is necessary not only to state the interlocutory Judgt & the facts on which it is founded but also the grounds of objection & the topics or arguments relied on at the trial.

Bills of Ex.

when allowed are no supersedeas of the judgt, but it allows the party to get a supersedeas by a Writ of Error. see 12 Mod 609. 1 Ba 927.

For the form of a Bill of Excep. see Bull NP 316-2 below it is, or there about. Morg. Ess 471 This is an abstract of it. "The first thing is the caption as Litchfield Co. to wit Sup. Ct time of Pltf. Bill of exceptions in an act of Ass. Plea - the gen. issue &c. It then proceeds to state that on the said trial the opposite party offered such a witness & the Pltf objected & the Ct so decided, & now the Pltf or Deft excepts to the Judgt of the Court in admitting said witness & prays the Judge to certify this Bill of Exceptions

The bill thus becomes a part of the Rec. & a foundation for a Writ of Error. But this is not so in Eng, for there it does not become part of the Rec. of the Court below 1 Ba & Ad 32.

"A bill of ex. ought to be on some point of law either in admitting or denying the evidence, or a challenge, or some matter of Law arising upon a fact not denied in which either party is overruled by the Ct" Morg Ess 466. 2 Dall 270.

Writs of Error

A Writ of Error is a commission to the higher court to examine the record on which any Judgt has been rendered in the court below, & affirm or reverse that judgt according to Law 3 Dall 407. 2 Ba 1887.

In Eng the Writ of er. does not summon the Deft in error to appear, like an original Writ, & it is then not an original writ. for Deft is there summoned by ~~summons~~ scire facias summons

(d) "There being no method of reversing an error in the determination of facts but by an attaint, or a new trial to correct the mistakes of a former verdict"

Writs of Error } by a nisi prius to appear ad audiendum
errores 2 Ba. 207. 216.

For the the form of the Writ of Error see 3 Bl. Comm.

Writ of Err. is strictly an original writ directed to the Sheriff or other proper officer calling the Deft to appear & hear the right
wd errors it is therefore a distinct thing from the Orig. writ of error
& Writ of Err.
founded on a mistake of the legal opinion of the Ct below, is brought for the reversion of such judgments as are entered on some point of Law appearing on the record, and not to rectify a mistake in the determination of fact or the weighing of evidence 3 Bl 407. 1 Roll 746 Cro C 233. Dyer 95. 1 Leon 233.

By the term "writ of error" without further discription is meant regularly one such as is described ie for some mistake appearing on the face of the Record 2 Ba 147. 3 Bl 407.

Upon the writ of error the Plff can recover or be restored to any thing as the matter of debt, damages or property of any kind it is considered as an action, & in such case a release of all act will bar the writ.

If the writ object of the Writ is to recover only the judgt of reversal & the costs recovered in the Ct below it is not considered as an action & of course a release of all act will not bar it.
For the distinctions between these two kinds of Writs see 1 Inst 288 b. & 260 152. 1 Roll 745. 2 Roll 405.

There is however a species of writ of error founded on matter of fact or matter debors the Record
& Writ of this kind lies only to such courts as have power to try questions of fact & not to any others, & as to the Exchequer Cham. for there they have no jury & the Judges can try questions of fact

Writs of Error } Cro Jas. 1 Vent 217. 2 Lev 240. 2 Ba 215.

Such a Writ may be brought in the C.B. in which the original judgt was rendered, & is then call'd a Writ "coram nobis or vobis," for in these cases the error consists not in any error of the Ct, the facts on which the error is founded being debors the Record. As in the case of a feme covert being sued & judgt rendered agst her, she & her Husband may bring a writ of error either before the same Court or the next higher, for the coverture is a fact debors the record

Again in an Act agst an infant the infancy not appearing upon the record, & he appearing without guardian or next friend but by himself or Att. he may reverse the judgt by a writ of error either before the same Ct or the next higher. — Had it appeared on the record that he was an Infant, the Ct would have appointed him a guardian pro tite. Carth 122. 179. 3 Ba 151. Sal 400. 1 Vent 217. Cro J 10. 2 Ba 195. 217. 228.

If a Def.a Def.t dies pendente lite & judgt is rendered agst him as living. Judgt may be reversed by his heirs or Exrs by error in fact. 4 Ba 143. Ray 59. Carth 335-9.

So also it may be assigned in a writ of this kind that the Judge who gave Judgt was interested in the cause, for this also is an extrinsic cause Sho 639.

Again if one sues & recovers as Exr or Admr. & after the latter dies in fact alive he may reverse the Judgt by a writ either coram nobis or before the higher Ct. There are some cases of this kind 3 Bl R 129. 1 Rol 744.

But a writ of er. will not lie on the judgt of any Ct not of record, for the writ is founded on a Record. Ergo.

Writs of Error } in Eng. it cannot be brought to reverse the judgts
of their Courts Cts they not being Cts of record — Lucas with us
1 Lutw 248 846. 2 Ba 194.

Neither can it in Eng be brought to reverse the
Decree or Judgt of a Ct of Equity & for the same reason it not being
a Ct of Record tho' of as high & sometimes of higher authority than
the Cts of Record. To reverse a Decree of Ct, an appeal must be made
to the House of Lords 1 Roll 744. Bull N.P. 235.

Error by Variance of
Ct may be reversed by a writ of error precisely as the judgts of Courts
of Law, but this is a creature of the Statute, & by virtue of ye
same it it lies to reverse the judgts of Cts of Com Pleas & also of
the judgts of Justices of the Peace but these both are strictly
Cts of record. 2 Inst 162.

There are then you will perceive two kinds
of Errors which are the foundations for two kinds of Writs of error
the one consisting of matter of Law appearing on the face of the
Rec. the other of extrinsic facts not so appearing

But if error in
fact & error in Law both appear in one writ, it is Duplicity, for they re-
quire diff trials, the error in fact must be tried by the jury & the
error in Law by the Ct. 2 Ba 217, 1 Roll 751. 1 Sid 147. Ray 231. 1 Vent 252
Yelv 96 Ray 59.

But the error in fact & Law are alended in one Writ
Writ of Deft pleads in nullo est erratum, he waives all objections
for the Plea generally confesses the error in fact. & then of course
there is but one error to be tried & possibly not even that. — If Deft
would take advantage of this double assignment he must Demr
Carth 334-9. 1 Lev 6. 1 Vent 252. Sal 268 6 Mod 113. 206.

A good Demr how-
ever will reach the mistake of both being matter of Law & of fact

(x) In Natoare in millo est erratum amounts to a Demurrer. Ruy 231.

Writs of Error] to the Defect is called Duplicity. It was cleared under pleadings &c. That Duplicity by 27 Eliz was ill only on Spec. Dem; Duplicity then, or to writs of error is not within that St. & therefore remains the same as at C.L. 1 Ba 95. Co 11th 338-9. 2 Ba 218.

And the assignment of more than one error in fact amounts to Duplicity & the unsuccessful party may then demur to 2d writ of error. Also the case the Judges on writ of error assigning she was Wife of Some event & an Infant, either of these would have been nugatory therefore it is ill Fitz 20.

But the assignt of any number of errors in Law, with the assignt of several Defects in a Spec. Dem is not Duplicity, for there can be no such thing. As an issue in Law extends thro' the whole record & reaches any fault in it, in point of Law. But when there are several facts, there must be an issue for every fact Com Dig Pr 3 B 15.

If an error in fact is well assigned, Deft in error cant prevail unless he traverse it, for the plea is nulla est erratum confess it but if it is ill assigned it does not confess it (d) Salk 57. 1 Sid 93. Ray 3 9. 231. 1 Rol 738.

It has been decided in our Ct at that the assign't of error in facts not assigned together with such error in Law, does not vitiate the Writ, Wint 27. 30.

In another case where in a plea in Abat. founded on error in fact & error in Law, the latter void the fact to be stricken out 1 Root 262. 2 Swift 277.

I have already observed that if error in fact is ill assigned the plea of in nulla est erratum does not confess it. However if the Writ assigns an error that contradicts the record it is ill. Since if Plff

Writs of Error & Would assign for error that the Ct did not sit on the day of the date of the judgt, the cause is not good in error so it contradicts the record Roll 757 & the averment that the judge did before the date of the judgt, is inadmissable. But there is a distinction to be observed between where error & the averment that, that which appears to be the Record is a forgery — for this he has always a right to do. An averment that Plff did not appear at the time specified in the Record is ill. And in all these cases the plea of in nullo est erratum confess the facts alledged in the Writ, for the reason that it contradicts the record 1 Rol 757. 2 Ba 218-9. Cro C 12. Cro Jac 686. Cro C 459. Yelv 204. Ray 231. Sal 262.

Where an error in fact is assign'd, the Conclusion should be with a venire ad quod examinetur &c. — but on this point the opinions differ & it is contended that there are some cases — where it should conclude to the country, but this to me seems absurd in any case, thus if Deft should plead Infancy & the Court himself on the country for trial, it would be absurd for and one has denied his infancy. — But this is new matter pleaded & as such would be referred, & then the opposite party might traverse, & the which he might conclude to the country. Bankruptcy by St may be concluded to the country Carth 367, 1 Ba 412. Contra Yelv 88.

It is a Gral Rule that for an error in fact a writ of error coram nobis may be allowed, & this I believe is the more usual course, tho it may be brought to a higher Court 1 Rol 747. 4 Ba 39. Sal 400. 2 Lev 98. Cro Jac. 1 Vent 207.

But on the other hand for an error in Law apparent on the Rec[d] a writ coram nobis does not generally or regularly lie, there would be a manifest impropriety in its going, for the question would be, to be

Writs of Error } to be decided by the same judges who before had Decided
Dr. St. Moore 186. 1 Sid 108. 1 Lev 143. 1 Roll 749.

But there are cases in which error appearing on the record is not a mistake of the Judges, but such cases are meere Exceptions to the Rule. Ex. gr. suppose the error to be committed by the Clerk in not entering on the rec'd the Judgt as it was awarded, in this case the Court before whom the trial was had is of all Cts the most proper for the error to be brought before. & this applies to all cases of errors by an officer of the Ct not one of the Judges. Settled an error in Law 1 Rolle 746. Pitch 21.

Errors of this kind are not in fact errors of the Ct & Therefore the writ coram nobis is proper

Agt if the error is in the process & it vitiates the judgt the writ of err coram nobis will ly. For the Judgt is rendered on the pleadings. And tho' the process is part of the Record, still it is such a part of it as the Judges are not bound to take ^ Pitch 21 Poph 191. 1 Roll 745. 2 Bac 215.

It was formerly a rule that error brought on an interlocutory judgt could not be brought before the final judgt was rendered — for the party against whom the interlocy judgt was rendered, might have the final judgt rendered in his favor & therefore it was unnecessary. 1 Rolle 749.

But the rule is now somewhat relax'd in the Eng Prac. So that if the writ be tested or bear date before the final judgt, if the return day is subsequent, it is good. And in this way indeed no injury can arise, for should the party afterwards obtain the final judgt he has nothing to do but to destroy the writ, which until then he has kept in his pocket 1 Vent 255. 2 Keb 705. Latch 133. 1 Sid 104. 466. 1 Br 208 or 280.

In Error

however the old rule prevails, at least it has been acted upon & by believe has never been altered 1 Root 141. 290.

Writs of Error

One Supr Ct has decided that the agreement between the parties that final judgt shall be given with a that error should be brought on the interlocy judgt, shall not be regarded, for the Ct cannot depart from their established modes of proceedings, by any such agreement.

It is a good Rule that when judgt is joint agt several persons they must all join in the writ of Error brought to reverse it — one or any short of the whole not being sufft. And if one should refuse to join he must be named & there must be a summons & severance Carth 7, 8, 367. 1 Roll 749. 3 Mod 194. This rule is founded in common convenience & expediency, for otherwise each of Defts might bring a seperate writ of error & thus keep Plff for a long time out of his execution

When I reverse the parts of the judgt as to the subject matter are seperate it may be reversed as to a part & affirmed as to the residue. Thus when damages & costs are both given, when costs ought not to be given, the judgt as to the costs may be reversed & the damages affirmed 1 Str 1189. 2 Lit 80 & 4 Burr 2022. Willes 116.

It has also been determined in our Cts & I think very properly, that where the judgt is several it may be affirmed as to part & reversed as to the rest.

We have certain Sts & there are also some of the same kind in Eng. which provide that under certain circumstances, Plff shall recover no more costs than damages, & in such case by a writ of error the excess judgt as to the excess may be reversed. Thus damages of £10 are given with £40 costs, judgt may be reversed as to the excess £40. I know of no precise case where this has been determined in Eng tho' there are several analogous ones. as 1 Roll 738.

Writ of error 5.

But now it have come the parties with & have decided that it can be reversed as to a part of the Defts & affirmed as to the rest, when there are several Defts. Thus in a Suit & Batt agst several persons one of whom was an infant, the judgt may be reversed as to the Infant & affirmd as to the adults thereby 114. 1 Rol 776. Cro J 289. 1 Ba 198-9. 228. This is directly opposed to the Eng Law.

No person can bring a writ of error but one who was a party or a privy to the origl act. As. the Heir is a real act when the party is dead, if in personal act the Exr or Admr, if the tenant who was a party is dead the Remr man, for he is privy in point of estate. 3 Bl 365. 1 Rol 748. 755. Dyer 90. 1 Sid 317 Fitzh 117. 1 Leon 261

The same Rule holds as to Defts in error. it cant be maintaind at all agst one who was a party or privy to the origl act. In this respect the privy is reciprocal

It is agn Rule also that no person who was a party or privy to the act can maintain a writ of error upon it, unless the error be to the disadvantage of himself. Thus in an act brought agst two persons one of whom was acquitted, the one who was acquitted cannot bring a writ of error, but it must be brought by him alone who had suffered. And this is not inconsistent tho rule above that when the judgt is joint they must join. for in this case the judgt is not joint 5 Co 39. Rol 90. 8 Co 59. 1 Lev 210 Str 892. Comb 425.

But there is an exception even to this last Rule, where the error was the fault of the Court & also alters the manner of the judgt, i.e. the nature of the judgt that ought to be rendered In cases of this sort the party in whose favor the judgt is, may bring a writ of error to reverse it. Thus in an act where the Rule

pla

Writs of Error } at C.L requires a misericordia to the amerce-
ment is omitted, either party may bring a writ of error. 1 Dud 127a

And if when
judgt should be rendered both for damages & costs, it is rendered only for
the damages, the party who recovers may bring error. Why is this?
It is because the judgt is incomplete, & not known to the Law
therefore neither party can be concluded by it 2 Ld 59. Com Dig 211
1 Root 259.

It is a rule in Com. Pleas that when on a reversal, Plff would en-
ter the Rule alone for further trial, he must do it in the same
term in which the reversal was 1 Root 85.

And it must be brought in the same county
in which the original act was tried. But this does not obtain
in Eng. for there all error must be brought in the county of
Middlesex 1 Root 259.

It has been decided in Com. Pleas that two judgts
of a like kind between the same parties & depending upon the
same principle of Law, may be joined in one writ of error
As in act on two Notes— It seems to me this rule might
lead to manifold inconveniences, Kirb 160.

According to our
practice a writ of error is signed by the judge of the court
to which it is returned 2 Swift 277.

It is also a rule of our
practice that when an exemplified copy varies from the origl
record, the origl will be ordered to be produced, for an exemplifi
fied can be of no higher evidence than another, as being as likely to
be wrong as the other, therefore when one varies, ~~the other~~ no judgt
can be pronounced by its evidence. It is not so in Eng for there
the origl is carried up. 1 Root 84.

Writs of Error } How far is a Writ of error a supersedeas to the execution? } It was formerly held in Eng that if the writ of error issued to Def[t]s error it operated as a supersedeas of the Execution during four days that being the time limited for obtaining the allowance of it by the Clerk, & it was in contempt to issue the execution after this before the time expired 1 Vent 255. 1 Rol 494, 2 Keble 129.

But it is now settled that the writ of error is no supersedeas until it is actually allowed, from that time indeed it becomes a supersedeas when the proper requisites are complied with 1 Sa 280. 1 Bac P 478. Bam's Notes 97. 2 Ba 210

By a "Supersedeas" is meant, the suspension of the right of the party prevailing in the Court below to take out Executions.

And the allowance of the Writ itself is a supersedeas for four days only after Judgt signed, that being the time prescribed in Eng for the Plff to put in Bail. If at the end of the four days bail is put in the Super[s] is continued, but if not it ceases, & the party who obtains judgt originally may proceed in taking out his execution. 1 Sa 280.

The Bail in this case consists of a Bond given with two securities in double the amount of the judgt. & this is prescribed by the Sts 3 Jas 1 & 4 Ch 2. 4 Ba 672-3. 1 Ba 212.

This bail is intended as a security of Deft in error for the satisfaction of the orig[l] judgt in the event of its being affirmed. And there is no Super[s] unless the bail is put in. For otherwise by means of this writ of error, Deft might loose the Prop on which he would have levied, Plff putting it out of his power.

In Comm. if such bail is given the writ of error operates as a supersedeas

Writs of Error } from the time of service of the Writ, it being served as an original writ: & if the after this proceeds to execute the origl judgt by Execution he does it at his peril, for he is a Trespasser & is in contempt see this case determin'd in the case of Phelps vs Lambe 2 Day. But it is no supersedeas until the writ is served for this is the only notice given

This bond secures the Deft in error of all debts, interest damages & costs to which he may ultimately be entitled on the affirmance of the judgt 1 Wils 98.

Exr v Atwr when Plff in error on judgt de bonis testatoris may have a Superd without bond a writ of error, in the Eccl. Prac. the reason is, they are not within the construction of the Act 3 Jas I which requires this bond to be given on writs of error Bro J 350. 4 Bac 672-B.

And in our Prac. the writ of error becomes a supersedeas when the execution on the origl judgt is in the hands of the Sheriff or other proper officer, by a copy of the writ of error being delivered to him see Phelps v Lambe 2 Day

There was formerly no rule in Comm. as to the time of pleading in Abatement of writs of error, but it is now established by a rule of the last Sup. Ct to be the same time as for the Sup. Ct at the opening of the Ct, on the term succeeding Kirby 289.

If one writ of error is abated or dis continued by default of Plff in error a second writ is no Supersd, for if a second would be a Supersd the party subjected by the origl judgt would suspend the execution by this means until the St of Limitations had run out. — which in this State is 3 yrs, in Eng 10.

If the Plff in error is non suited, he cant have a second writ

Writs of Error } & for a similar reason to prevent vexatious Suits 263
1 Keb 658. 2 Ray 97. Comb 19. 393.

But if a writ of is abated by Act of God or by some inevitable accident, this rule does not apply. As if it should be abated by the death of Plff. the heir ought bring a second writ & it would be a super. 1 Keble 688. 686. Salk 208. Moore 791

Writs of Error are not amendable except to make them conform to the original record & this is done by the 4 & 5 Geo I. the reason assigned is that amendments are allowed for the assistance of the Record & not to set it aside, & therefore writs of error are not now considered as under the Ds of Jeofails 5 Mod 16. 69. Salk 49. Carth 520. Com Dig Abm 264.

In Eng a writ of error does not abate by the death of Deft in error, the writ is continued by a sci. fa. ispeed expt the Ex or heir as the case may be. But in the death of the Plff it does abate, this distinction again depends upon the construction of the St of amendment

I doubt very much whether the writ would abate in either case in this state, altho the St has been construed very liberally, but I am rather inclined to think it would be decided as in Eng 1 Vent 34. Salk 264. Salk 264. Carth 286

A writ of error is not in all cases a matter that be claimed as a right. In Eng. there can be no writ of error expt by the permission of the proper officer, & if he on the inspection of the record thinks it would be a nullity or vexatious he will not allow it

The same rule prevails in Ev but on a Deft prin. 1 Rol 492. 2 Bac 210. Salk 324. 321.

Writs of Error

In Case of the judge to whom application is made to sign a writ of error where there is no probable ground of error it is his duty not to sign it. As the writ of error is a writ of right it follows that in any case the right judgt may get defeated, & it is on the principle the signing is left discretionary with the Ct. 2 Lutwyche 977.

Error is not in general predicable on proceedings which are discretionary. Hence on a Gen Rule. It is not predicable on the refusal to grant a new trial. We have this proceeding by motion & petition which if denied & condemned it is no cause of error.

But if a new trial should be granted under circumstances in the nature of which no new trial could be granted, & should a Ct which had not the power to grant a new trial grant one I have no doubt it would be error.

I have already observed that a writ of error when properly sued out is a supersedeas of the execution & all proceedings under it to enforce the judgt. But debt on judgt may be maintained notwithstanding the writ of error for an erroneous judgt is as good as any other until it is reversed 3 Wils 345. 7 DR 458. 1 Ld Raym 236. 8 Co 142. Com Rep. 177-8 Ray 100. 1 Lev 153.

But in such cases the Ct will in its discretion stay the proceedings on the act of debt until judgt is had on the writ of error. for it would be hard for Plff if it not so. 2 DR 68

When a third person obligates himself to pay what shall be recovered in a certain suit agt AB, & an act is brought & recovery had agt AB, & he then brings a writ of error. I. is not liable until the determination of the writ of error for tendet the writ of error the suit is not determined, & AB may still not have the act 2 Mod 272.

4

Writs of Error

When the Ex on the original judgt is completely executed, as by the taking & imprisoning of the body, or by the sale of the land or goods, the writ is no longer a supersedeas, it does not liberate the body or restore the property. The effect of the reversal is a distinct thing Fitzh 237, 1 Vent 30. 4 Ba 684.

If goods have been taken on the original execution but not sold. According to the opinions of some lawyers the writ is a supersedeas, but this seems not to be Law. The other & better opinion is that it is not supersedeas as the principle is an execution once begun must be executed, & by the taking of the goods it is begun (2 Rol 491. 2 Ba 211. 370. Yelv 6. 1 Vent 258. Sal 147. 2 Ray 990. Cro E 497.) therefore the Sheriff must sell them. see also. 2 Day 370.

As to Com. practice an erroneous judgt, as to the exist Bail is of the same effect with a final judgt or a correct & lawful judgt i.e. If the original Bail was not liable by the first judgt he is not by the second or reversal, so if the original judgt is in favor of the Deft his Bail is exonerated even should the Plff recover in error. Thus suppose A gives Bail for B. & B recovers, then the judgt is reversed, the Bail is not liable

This was once the rule in Eng. but is not now. & in both countries Eng & Con it depends upon the construction of the W. the phraseology of both which are I believe very much alike, but they have received very diff constructions, for the Con Rule see 1 Root 567. 2 Swift 179-6. & for the Eng. rule see Cro J 94. Stra 419. 526. 1 Ba 212.

If the Plff in error does not assign errors when he has brought his writ. The orig judgt is neither affirmed or reversed, but remains good. & in this case Deft in error does not recover costs, but he must sue on his bail bond for to recover them — for no error being assigned there is nothing for the Ct to give judgt upon, 1 Sid 294

Writs of Error

If Plff is error is nonsuited there is no judgt or reversal given for him but it is given for Deft in error, to recover the costs. The Ct have nothing to do with the error assign'd as the Plff in error is out of Court. This being the case Deft is entitled to costs the original judgt remaining good

The reversal of judgt in some cases supersedes & overreaches the proceedings under the original Execution. In other cases it does not.

The Gen! Rule laid down by my Lord Coke in his greatest Language is this. "That collateral things executed are not deserted by a subsequent reversal of the judgt: but collateral things executory are deserted. 8 Co 142. This is the genl rule & means that if goods or lands have been taken on an execution & delivered to the judgt Creditor on a valuation or appraisal. But after this the orig! Defts recovers the judgt & that the title of the orig! Plff is overreached or in the Lang of Coke the "things collateral are deserted", as they are call'd the things executed lying in the hands of the Creditor. & are not deem'd collateral things executed. 1 Roll 775. 2 Ba 231-2. 370. Cro J 246. Yelv 179.

But on the other hand if the property taken by the Sheriff on the execution is required by Law to be sold & he sells it to a Stranger. the Stranger will hold notwithstanding the reversal. — This is a collateral thing executed within the rule of L! Coke 8 Co 143. Cro E 278. Yelv 108. 3 Lion 89 Cro J 246.

What then it may be asked is the remedy in this case? The remedy lies in the recovery of damages. i.e. on the reversal Plff in error recovers the amount of damages equal to the property sold, and the Bail is responsible for those damages if Deft in error fails to pay them 8 Co 143. 2 Cro J 246.

Writs of Error } If a Party Testator or Executors on the original Judgt escapes & before the acc agt the Sheriff for the escape is determind the Judgt is reversed, the acc for the escape is gone by the reversal

But on the other hand if Judgt & Executions were obtained agt the Sheriff before the judgt was reversed, the judgt against the Sheriff would remain good notwithstanding the reversal — the collateral thing is executed. Thus suppose A sues B & recovers judgt & execution is issued agt B & he escapes, if the acc is brought agt the Sheriff for B's escape, & the judgt is reversed in the writ of error before that agt the Sheriff is decided, the acc agt the Sheriff ceases

But if judgt was had agt the Sheriff previous to the reversal, the Sheriff would be liable for it is a coll thing executed & he cant plead and tell record the reversal for the execution has gone out agt him. he however may have relief by a writ of audita querela & this is his only remedy. 8 Co 142. 1 Sam 388 Cro J 646

But suppose property to have been taken & sold off to the judgt Creditor & he sells it to a third person before the judgt is reversed. the question is (this given to Moot for the next night Friday 6 Nov 1818) Is the purchaser secured by the subsequent reversal J Reeve thinks. 8 Co 142 b

Yelv 164. 179. Brownlow 107-108.

If the Sheriff having taken property on an execution had sold it to a stranger, when the Law did not require the sale, the subsequent reversal defeats the purchaser & the original holder recovers possession. Thus in case of an outlawry in which the property is forfeited, if Sheriff sells he does it agt authority, as he should hold it for the King, & the purchaser buys it at his peril 5 Co 90. Cro Eliz 778 2 Bu 778.

Writs of Error } In Com. Writs of Error are barred after the lapse of 3 years from the day in which the original judgt was rendered. In Eng. the time allowed is 20 years, & by the U. S. Laws I believe it is 10. see 1 Root 54. 1 Ka 257. 2 Ba 208. This time of 20 yrs is limited in Eng by St 109 & 11 Wm III

When judgt of affirmance is rendered for Deft in error he recovers his costs for the writ of error. But Plff never recovers his costs on his writ of error, even when he obtains a reversal or prevails in error. but if the reversal puts an end to the controversy. Damages are awarded him for the costs he would have recovered in the original act.

But if on the other hand the reversal does not put an end to the controversy. the cause is remanded to the Court below or entered for further trial in the same but higher Ct

The Rule is that if the Ct above can try a question of fact & assess damages it is tried there, but if that Ct is incompetent to that it is remanded to the Ct below. no am.

If Plff in error has paid any thing on the original judgt. he recovers on the reversal that sum as damages. But if he has paid nothing he recovers nothing in the form of damages. but he never recovers costs as nominal

If however there is a reversal which does not decide the controversy, but further trial is permitted, the whole costs according to our practice await the final judgt what the Eng rule is I do not know.

And if the original Plff recovers judgt below which was agt himself & is entitled to prosecute further & does not — he does not recover the costs below even under the name of damages. Nor the Deft was deemed to & adjudged ill, this judgt reversed in the Ct above the judgt of which costs

Writ of Error } "that the Deft is nonsuit" so that he has a right to sue again if he does not do it, it is considered as proof that he himself thinks he has no cause of action, therefore he shant have costs.

Upon a judgt of affirmance in error the prevailing party is entitled to interest on the orig judgt both in Eng & in this State. but it is awarded at the discretion of the court. This rule is a consequence from the writ of error operates as a supersedeas to the execution, the interest should be allowed on the original judgt on account of the delay. It is left discretionary with the Ct by Sts. but in this county I know of no case in which it has not been allowed. & I believe it to be the same in Eng. 2 Lev 162. 1 B & P 29.

Rule is the same as a nonsuit or retraxit, Deft in error is entitled to the interest, &c. anc.

But in Debt on the recognizance of the Bail in error. Interest is not allowed by the Eng rules. for the allowance in any case is discretionary but in this case it is not allowed. I suppose it is not within the St 2 & 3 E 6 c 13. 15. Dang. 723. 2 Atk 284.

Cases exemplifying the effect of an affirmance or reversal of judgt. on writs of error

A
vs
B } In the Court below

Case 1st — Judgt below for A to recover of B £20 debt & £10 costs — Judgt reversed before A has collected any part of his exn — Judgt above is, That the judgt below be reversed; & that B recover of A £10 the amount of costs incurred by B in the Ct below — but no costs are recovered by B on the writ of error

Case 2d The case as before except that A has collected the contents of his exn viz £20 Debt & £10 costs. Judgt of

Writs of Error } of reversal as before; & that B. recover £40. viz the £30 paid to A. as the erroneous judgt & 10£ costs which B. ought to have recovered in the Court below.

Case 3d. Judgt below in favor of A. as before, affirmed in the Court above, here the judgt above is, that the judgt below be affirmed; & that A. pl Deft in error recover his costs on the writ in error. The judgt below is again operative. — Interest on the first judgt is also allowed if the Ct in their discretion think proper & 4th issues for it. The practice below is to allow it of course 4 Cowen 162.

Case 4th. Judgt below was in favor of B. pl the Deft below. A. by a writ of error reverses that judgt — The judgt in this case is merely a judgt of reversal. — If the court above is competent to try questions of fact (as B.R in Eng & S. C. is both A. on the judgt of reversal enters pl cause in pl Ct above for trial & on final judgt (if he prevails) recovers, together with his debt or damages all his costs which accrued before the judgt of reversal, as well as those which have accrued since — But he recovers no costs on the writ in error — If A. had paid pl costs, taxed agt him on the judgt below, he would have recovered that on the judgt in error as damages. — But A. must enter the reversal at all in the same term, in which the judgt of reversal is rendered. 1 Root 85. "Practice" 2. 3.

Case 5th The Ct which reversed the judgt in the last case was incompetent to try questions of fact (as the Exch. Chamb. in Eng. & the Supr Ct of Errors in Con) the cause is either remanded to the Ct below, where it must agn be proceeded in de novo — or if it is ripe for final judgt. it will be rendered & execution issue by Ct of C. (1 Day 152. Guern et al. v Chester) Bos & Pul 96. 2 Ray 10. Carth 319. My Rep 43.

Writs of Error } Case 6th. Demurrer in ye Ct below to ye Decr. Decr is adjudged insufficient — On writ of error the judgt is reversed Here it would in gent be absurd for D. to enter; since his Decr is adjd insufficient & the Deft below never wishes to enter for trial & still he may enter so that if his Decr can be helped by amendmt he may have an opportunity to do it. (R. by S. Ct.)

Case 7th. Decr in Ct below adjd insuffy. Reversed on writ of error. — Here D. enters for trial. if the Ct alone can try questions of fact. For he has a good Decr & the merits have not been tried; since the Ct alone have rendered only a judgt. of reversal — not a judgt for D. to recover. — And the Court alone cannot on ye judgt of reversal ascertain the damages

Case 8th. Plea in bar. Demurred to below — adjd insuffy. — judgt reversed — D. enters for trial — for as yet there is no judgt for D. to recover. & on the face of the record for ought that appears he has a right of recovery.

Case 9th. Plea in bar adjudged insuffy below — Judgt. reversed. if D. would enter it would be to no purpose — D. has no wish to enter: For his only object is to defend. & that object is attained by the reversal

Case 10th. Plea in abatement, adjd below ye writ abate — judgt reversed alone — Plff enters for trial; for he has a good writ & has a right to prosecute to final judgt.

Case 11th. Plea in abatement as in the last case — judgt of respondeas ouster in the Ct below. — Reversed in error — D cannot enter: for he has no right writ. Qu. may he not enter, if his writ can be aided by amendment — as in case 6?

Case 12th. If error is brought for the admission or rejection of evidence. Plff below may enter for trial, on reversal whether he is in error Plff or Deft & whether the judgt. of reversal is for or agt him. Ex. gr. As witness was rejected

Writs of Error } excluded below — On a bill of exceptions the judgt is reversed — A. enters for trial — Here he is plff in error & the judgt in error is in his favour.

Bs. witness was excluded below. — judgt reversed — Here B. is plff in error & the judgt of reversal is in his favor: yet A. may enter for trial if he pleases, for he possibly may premise notwithstanding the admission of Bs witness.

Notes

In all the above cases in which the original plff is supposed to enter for trial, on a reversal of judgt, the Ct alone is supposed competent to try questions of fact — If this be not the case the record is remanded to the Ct below, & there the final trial is had. (4 & 5th supra)

When the judgt in error puts an end to the litigation between the parties, the ac is never entered in the Ct alone, nor remanded, for trial. The litigation is always ended when the judgt is affirmed: but it is in many cases otherwise on a reversal of judgt.

New Trials

A New Trial requires no definition. it is simply a second trial

The mode of obtaining it in Eng is a motion made in Banco i.e. to the Ct at Westminster Hall &c. and not at Nisi Prius &c.

This Motion if sustained, grants a rule to shew cause why a (N.T.) should not be granted. & this prevents the judgt. being entered up until the new trial is had. B.N.C. 328

And a new Trial may be entered at any time before judgt. but in Eng. never after it. indeed in Westminster this would an unintelligible thing Doug 769. 2 SR 78.

In Conn however, the new trial may be granted as well after as before Judgt, & this is authorized by St. And may be obtained as well by petition as by motion.

I am not sure but that this mode of proceeding by petition is peculiar to this state. tho it may be the mode in Vermont. And the Petition may be exhibited at any time within 3 years. This mode of applying for new trials by petition probably originated from the former practice of applying for them to the Gen'l Assembly. For at the time this state was colonized new trials were scarcely known or at least very uncommon in West.r Hall the remedy then being by attaint of the jury &c. but they being necessary our Assembly established rules for themselves, which were that applications should be made to the Assem.y, & till within a few years this was the practice. (Sh Con. 28. in ac cinits) Kirby 163.

New Trials { Under our Prac. I take the distinction be-
tween the proceeding by petition & motion to be. that when the
ground for the application for a new trial arises at the trial as
the misbehaviour of the parties or of the jury, a misdirection
to the jury by the Ct. an improper admission or refusal of
evidence, & any thing of the like kind. the application is by
Motion.

But when the application is founded on something arising
after the trial as the discovery of new evidence or of mis-pl-
eading at the trial, the application is by petition. This is -
unknown in Eng. but it is no uncommon thing with us.
& the Ct is thereby cautioned &c.
But now since double pleading is allowed it is not like-
ly to be of much use, for now no party can fail on the
ground even through the negligence of Counsell.

Until
lately no particular time was limited during which the
petition should be presented. But now by St it is limited to
3 years after the original trial 1 Ken. 598.

This Petition states
the ground of the application. And the opposite party may
either demur to it, or plead to it as to any other pleading. &
it is accompanied with a summons to the adverse party to
appear. And is signed & served like a petition in Chancery.
but it never stays the proceedings, or is no supersedeas.

An appli-
cation for a new trial is generally considered as an appeal to the dis-
cretion of the Ct. hence if the Ct discover that substantial justice has
been done they will not grant a new trial even tho' some mistake
has intervened 3 Wils 36 27. B.N.P. 326. 2 East 451.

Hence when a verdict is
found for Deft in what is call'd "a hard case" as a prosecution on.

New Trials } on the same terms in Eng. they being looked upon as odious, or for negligently keeping his fine. In gen the Ct will not grant a new trial even tho' improper evidence had been admitted et vice versa, or any other mistake had happened. id. acc. & 3 Bl 391-2. Sal 116. 644. 646. 648. 1 Bur 394. or 399. 2 Str 405. 2 Ld 469.

And there have often been cases where the jury have raised presumptions contrary to the evidence especially in those hard cases where the Ct have refused to grant a new trial. There is one singular case, where a man killed a bird, & the jury observed that he might have scared the bird to death & not have killed him with the shot. The Ct observed that this was not at all probable, but they would not award a new trial

Upon the same principle, the Ct may impose terms upon the party in whose favor the new trial is granted - when ever they please, & he shall have a new trial" If he will disclose certain facts upon oath - they being known only to him - or will admit certain facts, - or produce certain books or documents - he is not bound to produce - or consent to an extra judicial examination of witnesses, it being too expensive to get the evidence judicially &c.

But the person against whom the new trial is granted, can never have terms imposed on him - he having no advantage to gain 3 Bl 391. Sal 648.

When the ground of the application is any matter that arose at the trial, as the admission or rejection of a witness - the Ct in banco (or elsewhere) receive the information from the certified report of the judge at N. Prius.

But if it did not arise at the trial the information is disclosed by affidavit. 3 Bl 391, 2 Lev 140. 1 Sid 295.

New Trial } Error It has been observed pa is not paid in
cable upon the proceedings on a motion for a new trial Hist 41. 2
Dacy 364.

In Com. new trials are not grantable by a justice of the peace.
But it may be granted by the Supr Ct & C.P. but no others come
within the St. Hist. 9. St Com 28.

New trials appear to have been very
little if at all known to the ancient C.L. prae. Mr Jus. Bl. has by his
researches traced them back to the time of Ed III, & others assign their
origin to the time of the Commonwealth.- but they were not com-
at any rate not regulated as they now are until after that pe-
riod- & were granted only for gross misconduct. but in later ti-
mes they have been very much extended, & now conduce more
to the cause of justice than any thing that has been introduced
in modern times 3 Bl 387.-8. Sal 648. Str 995. 1 Bur 394-5. 3 Sr
131.

And of late years new trials have been granted after trials
at bar as well as at N.P. which was formerly held impossible
except in the case of the misbehaviour of the jury: for the same
judges would be obliged to decide what they before had decided.
But is a convenient rule as the judges may here be willing to
retract what they before had decided wrong. 1 Bur 395. 2 Ray 1360.
Str 583. 1105. 5 Ba 243. 7 Mod 97. Sal 648.

With regard to the gen-
principle, in all cases of sufft importance a new trial may
& ought to be granted, if it can be made to appear that injustice
was done in the first trial 3 Bl 388. 1 Bur 395. 6 Sr 638.

When how-
ever the cause is of very small importance or consequence
a new trial will not in gen be granted for any cause
1 Bur 395. 4 Br 758. Bur 665. 2093. 3 Bl 388. 392.

New Trials } It is a gen Rule that a new trial cant be made after a motion in arrest of judgt; for the latter if it prevails supersedes the necessity of the former.

But to this there is an exception, when the cause of the new trial was unknown at the time of moving the arrest. Sal 647. B.R.S. 325-6.

It was formerly holden that when there were several Defts and part were convicted & part acquitted, that a new trial could not be granted except for the whole; for it was said the verdict must either stand or fall in toto. Thus when A & B were Defts & A was convicted & B acquitted, no new trial could be had for A. unless for B. also. But this is now over-ruled — & a new trial may be now granted for one or a part only of the defts. Indeed the case wd be hard that one should be excluded from a new trial because he happened to have join'd with him in the act one who was innocent B.R.S. 325. Sal 362. 12 Mod 275. 3 Keb 609. 1 Stra 814. 6 BR 619. 638.

In cases of this kind when a new trial is granted for one of several defts being the only one convicted — the acquitted cant be brought to trial, for no man shall be tried twice for the same crime — so he alone who was convicted & obtained the new trial shall be tried when the record goes down for the new trial.

Cases for granting New Trials

II Want of due notice of the trial to Deft. is in the Eng. prac. good cause of new trial. Here the Plff is to give notice at what time he will bring his suit. But in cases of this kind however if Deft attends & makes his defence, he waives the advantage, for if he would avail himself of the want of notice he would not attend. Sal 646. B.R.S. 327. & Ba 241. Sal 435. 428.

New Trials } I doubt very much whether in this case the Ct have a right to use their discretion in not granting a new trial if they think substantial justice has been done. for Deft has an indoubted right to be heard, & unless proper notice has been given there has been no trial to which Deft was a party.

III A New trial may be granted on the score of some defect, disqualification or mistake in the Judge before whom the cause was tried. as if it appear that he was interested in the cause, or also I suppose for relationship to the party prevailing - would be cause of new trial 11 Mod 119. 5 Ba 244.

And there is a great variety of instances in which new trials may be granted for mistakes of the judges in point of Law. as the admission or refusal of evidence improperly — misdirection of the jury &c. indeed any mistake of the judge in point of Law is cause of new trial 6 Mod 242. 7 it 53. 64. 10 it 202. B.R.P. 927. 4 BR 579.

And new trials for these & many other cause may be granted after trial at bar. & there you will observe the application is made to the same judges who committed the mistake 1 Ba 585. 1105. 1 Bur 395. Doug 420. & 2 BR 5. In this last case however the new trial was refused on the ground that substantial justice had been done.

But the incompetency of a Witness not objected to at the trial, is not of itself a substantive ground of new trial, even tho it was not known to the party making the motion, at the time of trial, But if there were other grounds branched this will have some weight 1 BR 717.

But there have been two cases determined in our Ct within my my time which are opposed to this Rule - the cases are not reported as to the point they are Palmer vs Lambert & Willets vs Paterson

New Trials. Cases

Tho a witness called to prove a certain point is improperly rejected. & another witness testifies to the same point, & the fact is not contested, no new trial can be granted. as the ground 3 Last 451.

IIII. Any defect or incompetency of the jury or any one of the jurors - as if one was of the array who was disqualified by Law & was unknown to him making the motion for new trial; at the time of trial in time to challenge, it is good cause for a new trial.
One of the cases cited will seem opposed to this rule - but it is not so for there the person knew of the fact but did not challenge 5 Ba 245. 7 Mod 34. 1 Vent 38. 2 Con 129.

It is doubtless in your recollection that motions in arrest of judgt are concurrent remedies with motions for new trials in this State.

IV Misconduct of the jury - as. partiality, bribery, inattention to the cause, or a departure of the jurors to the decisions of chance &c. cause &c. so that not only absolute corruption but inattention & the like are considered as gross misconduct in the jury, & vitiates the verdict by laying a foundation for a new trial. 2 Lev 148. Stra 642. 5 Ba 250. 288. 291. B.N.P. 327.

And for the same reason a new trial may be granted for the misconduct of any one of the jurors, for as the Law requires 12, it requires 12. just & impartial jurors, Thus when the jurors on Declared that Defft would not have a verdict whatever evidence he would adduce, the verdict was vitiated, & the ground is good for a new trial Sal 645. B.N.P. 326

V. — In very early times perfect unanimity in the jury was not necessary. But for a long time past it has been necessary 3 Bl 375-6. 5 Ba 287.

And the Engrule is that if the jury will not agree before the close of the term

New Trials. Cases } they shall be carried around, after the Judge from county to county untill they do agree. This has never been done in Con. but it has been done by the U.S. Circ Ct. 5 Ba 287.

In Con.n of the jury do not agree, they are to hold the cause under consideration untill the close of the term & if then they are not agreed they are discharged, but never before & not by consent of the parties

But both in Eng & Con. if the jury are not ultimately unanimous in their verdict, it must be set aside. But in this State when one of the jury was sick or otherwise unavoidably absent, upon agreement of the counsel the verdict of the eleven was received 5 Ba 287.

There has however been adopted both in Eng & Con. a plan to evade the rigour of this rule. it is by bringing in the dissent of the minority "silent" as it is called, i.e. they neither dissent or assent, so that the Ct know nothing of it. and if the Dissenting do not object before the recording of the verdict they are not allowed to afterwards, for it would be to testify to his own misconduct - & not doing it before 5 Ba 257. 291. Wirt 141. 416

By the rule of the Ct. the jury to whom a cause is committed are to be locked up & oversight had of them by the constable or other proper officer, untill they agree in a verdict, & any evasion of this restriction is a contempt, & if they either eat or drink during this confinement without consent of the Ct it is a grop misconduct 5 Ba 290. 375. 1 Vent 125. Moore 33.

But their eating or drinking without permission does not vitiate the verdict unless they do it at the expence of him in whose favor they render the verdict - but it subjects them to punishment. for their eating &c at their own expence carries no presumption of bribery or partiality, but if at the expence of the party &c. does. 1 Just 227. 12 Mod 411 1 Lev 132. 2 Ray 1163. 1 Vent 125. 5 Ba 290.

New Trials

Privy verdicts

But for the purpose of relieving the jury from this inconvenience, the Cts in Eng. have allowed what is called a "Privy Verdict", i.e. they deliver the verdict out of Ct at the chamber of the judge - This is allowed in some of these U.S. 1 Dall 225. 3 Dl 377. Blow 211. 5 Ba 282, 1 Dall 276.

And yet a privy verdict seems to amount to very little as to its effect, for after the delivery of it, they may afterwards either affirm or deny it in Ct.

After a privy verdict the jury's eating & drinking at the expence of one of the parties does not initiate it, unless they afterwards alter it in favor of that party - Then it does initiate it & a new trial may be granted, it being presumptive evidence of bribery &c. 1 Vent 125.

But these privy verdicts cannot be given in cases of felony or of life or member, or in which the personal presence of the party is indispensible for his conviction; for in this class of cases the Law allows of no verdict but what is pronounced in the presence of the prisoner Ray 199. 1 Vent 97. 2 Keb 687. 697.

In Iowa privy verdicts are entirely unknown; for our jury are not confined during their deliberations; altho we have an express St. to the contrary. That St. establishes the Ct's mode of confinement.

It has sometimes been said that the jury have a right to found their verdict in part on their own personal knowledge, without disclosing it to the court, but this is not Law: For no juror has a right to disclose any knowledge of this kind to his fellow jurors, for it is not given in under oath, but is rather contrary to his oath: if he is possessed of any knowledge, which in his conscience he thinks he should consider in making his verdict, he should give it under the witness' oath, otherwise it is gross misconduct. & the opposite

New Trials & point party has no opportunity to answer it 3 Bl 374-5
1 Sid 193. 5 Ba 289. Vaugh 147.

The jury have no right to re-examine a
witness in private after they have retired; for they are sworn to give
their verdict upon the evidence given in Ct, if they do re-examine a
witness the verdict is inadmissable & a new trial should be gran-
ted — for they may ask improper questions & do not know what
evidence is relevant & what not. 2 vol C 189. 411. 5 Ba 288.

In the Eng.
Spac the jury are not at liberty to take out with them any written
evidence exhibited at the trial — if the do it is misconduct.
It has however been held that if the evidence is on both sides the ver-
dict is good. —— But the evidence may be stronger on one side
than the other & so cause a preponderance; the distinctions seems
to me to be too vague & indeterminate 2 vol 714. 2 Ray 146. 1 Durt.
227. 12 Mod 250 2 vol C 411

But if they take any written evidence not exhibited
at the trial the verdict is bad of course & a new trial will be gra-
nted 1 Sid 235. 5 Ba 289. 288.

It is however a Rule that the jurors
misconduct cant be proved by themselves — but it must be from
another quarter, but as they deliberate by themselves in private
this must oftentimes be a matter of difficulty — formerly they
were examined. But now they cant be examined neither shall
they be compelled or even permitted to testify to their own mis-
conduct. 1 Str 11. Barns 425, 441. 2 vol C. 189.

If the Foreman delivers
a wrong verdict by mistake, it must be set aside and a new
trial granted, & the jurors are admissable witnesses to testify
to this fact 1 Bur 389.

The jury's finding a gen'l verdict when directed

New Trials { directed to find a special one is not misconduct for they are not bound to find specially.
But in such a case if the gen. verdict is agst the opinion of the Ct. a new trial will be granted. It then is not of itself a sufft ground of a new trial but it is an auxiliary reason for granting one 1 W 213. 5 Ba & M. 7 Mod 97. This last would seem to imprune this ground but it was a motion after a trial at bar.

VII. Another ground for new trial, is, that the verdict is contrary to evidence, this is Law both in Eng & Con. but it was not so decided until the last year — this Rule has been very much objected to, as that Ct were usurping the province of the jury — but this is not the case for the Ct do not decide the issue but only refer it to another jury — & it would indeed be amputating the right arm of the Ct to deprive them of this power 1 Ha 1105. 8 M. & S. 326-7. Cow 37. 3 M 392.

This is a subject on which the administration of justice in any country depends, so far as it respects the rights of persons in a trial by jury — & the cases that have occurred amply demonstrate it, they were cases where the verdict was so fully agt evidence that Ct could not avoid the belief that the jury was corrupt. There were a set of cases which arose in Penn. as an early as Mart[ese] as Mart[in] without a single point of Law being involved — the cause was brought on the strength of the prejudices of the jury, it being made a political party ques. The judge directed the jury to find for Deft — they found for Plff. The verdict was rejected & referred to another jury — & so several other juries in succession & they all rendered the same verdict & one was ever obtained so the parties were obliged to compromise for the judge declared would hold out to the day of judgt — before he would accept such a verdict — Similar cases have occured in other States.

New Trials } It is to be observed however that a new trial is not grantable merely because the judge thinks the evidence preponderates agt the verdict — for this is contrary to Law. for by the words of Bl. when "the scales of evidence hang merely equal" a new trial ought not to be granted. — But when the verdict is decidedly agt evidence a new trial ought to be granted, Note Bl says that is all "which leans agt the verdict ought strongly to preponderate" — on granting a new trial 2 Bl 392. Stra 1142. B.N.P. 327. Barns 322. 5 Ba 247.

VIII When a jury have given a verdict on a misconception in point of Law, or rather agt Law, it is cause for a new trial, there are not many cases of this description, — they never when the facts are agreed, or where there is no doubt as to the facts, & the jury form a conclusion of their own which is wrong in point of Law 3 Bl 646. Comb 402. 2 Bl Rep 1087. 2 Wils 307. Stra 425. 4 DR 470. 1 Johnson 279.

But a new trial is never granted for this cause in what are call'd hard cases, or where substantial justice has been done.
And if the mistake is made by the judges they put themselves under more obligations to grant a new trial in such cases than when it is made by the jury. 2 DR 5. 5 Bl 425.

And upon this principle of discretion if the Plff is in point of Law entitled only to nominal damages & the verdict is for Deft. a new trial will not be granted — for the case is of too small consequence & indeed substantial justice has been done. agt such causes are generally for vexation & "the Law will not assist the evil passions of men" 4 Burr 2093. 4 DR 754. 5 Ba 246.

VIII Another cause for new trial is the smallness of damages which are awarded in some cases. — This however,

New Trials } is not cause of new trial except in acc^n of Debt, on bond from. Note, or where there is some liquidated sum that should be recovered, is definite — But never in acc^n of tort has a new trial ever been granted for the smallness of damages. But when the acc^n was on a Note for £1000. & the jury found only half that sum & there was defence set up as payt or any endorsement — it shd award a new trial Str 940. 1051. Barns 332. 368. B.N.P. 327 — 4 BR. 955. Barns in pa 454 contends the reason under the rule in the case of torts, but the Cts have ruled with him.

This rule does not hold however when the jury have made the damages too small from a mistake in point of Law, as where there were several claims, & one of which the jury supposed not good in point of Law. Or when Plff was deprived of his just damages by craftiness or fraud — Or when there was a mistake in the computation of putting different sums together — here a new trial may be granted Str 425. 1259. Salk 647.

IX Excessiveness of Damages is another ground of new trial & is good both in cases of Contract & Tort. In acc^n on cont^t for a liquidated sum there is no difficulty in applying the rule but in torts there is some more will a motⁿ may be granted. But N.P. 327. Cont 17. 1 BR 277. Sal 649. 1 Bur 609. 2 Bur 1146. 4 BR 657. 5 id 2657. 7 id 529.

It has been laid down & strongly urged that excessive damages in cases of tort is not cause of a new trial, unless at the first blush it will excite a presumption of partiality in the jury — This is the opinion of L^d Camden — but it is not the rule — but when in the opinion of the judges who are supposed to be well qualified for the duty think the damages enormous a new trial may be granted.

The rule presently now is that a new trial may be granted for excessive damages in case of tort as well as of contr^t

New Trials. } But a new trial has not in any case been awarded for excessive damages in Crim. Con. acts. Ld Kenyon doubted whether it should not be allowed in these cases as well as in any other. And Buller thinks it might be granted, as well as in other cases. & of this opinion is Mr Gould 4 BR 651, 657. 4 Ba 250. 5 BR 257.

New Trials have been granted on this ground in cases of Assault & Battery - tho the injury is personal & the standard of damages vague & presumptive. tho that for property is better definite 1 BR 277. 5 BR 257.

It seems well established that excessive damages is good ground for new trial in cases of slander. States 462. Sal 644. 1 Burr 394. 1 Lw 97. 1 BR 277. 2 Wils 249.

But I believe the true Rule is laid down by Ld Mansfield in one of the cases cited (1 BR 277) viz. that "the Ct have the power to rate the opinion of a 2d jury, in any case when the damages are excessive; but all these questions depend on their own circumstances, on which the Ct must exercise their discretion" Com Dig Trial Ct. 1 BR 277. 4 BR 657. 2 BR 166 5 BR 257. 2 Bl Rep 929. 1327.

There is one other class of cases where no new trial has ever been granted on this ground - of excessive damages, they are acc on the case per quod amisit servitium. brought by a Parent for an injury done to a Child. Tho all the motions for new trials have several times been made, they have never been granted - the case is a strong one 2 BR 167. 2 Wils 18.

When excessive damages are given by mistake of the jury in computation no new trial will be granted if Plff will agree to release the excess. If he will do this he may take judgt for the residue 2 BR 117. 123. Chit. R. 213. 1 Bl Rep 88. Com 571. 2 Wils 262. 1 East 637.

New Trials } And the same rule has been adopted when the mistake has arisen from the mis conduct of the parties, as from the Plffs exhibiting a false computation - in which the jury acted in forming the verdict. here Deft may take advantage of the release of the excep. 1 Atk 8 & 8. Chit 213.

7

X In Con. it is by St a cause of new trial if the parties counsell has made a mistake in the pleading or has made a wrong plea, as the pleading a defence which would not avail him, when he had one that would have availed him 2 Lev 28. Cro Jac 6 But I find no rule like this in the Eng. prac. — indeed it would seem from all we can find in the Eng. books, that this is not there a cause for a new trial 3 Bud 1355. 2 Str 191. 10 Mod 202-3. 1 Last 637.

It is certainly a good rule that if neglect of counsell is not cause for a new trial — In such cases the remedy of him who sustains the loss, is by an action agt the counsell Sal 545, 6 Mod 22. 222., 5 Ba 251.

And in Con. where mis pleading is by St made cause for new trial. I doubt very much whether the Ct would allow a new trial to enable Deft to plead the St of usury or of Limitations, or indeed to let in any unconscionable defence, even tho' in point of Law it is sufft. for there are rules of positive Law, founded only in public policy & convenience & altogether opposed to the justice of the parties as regarded the parties themselves. and as new trials are discretionary with the Ct. they in this case will not be awarded 1 Bl Rep 35. Str a 1242. 00 1 Bac Ab 52.

In Con. when one petitions for a new trial on the ground of mis pleading - he must state in his petition, the plea or defence - & that he is able to prove it — 2d that the Ct. may see whether it is sufft in Law 1 Root 473. 2 Swift 271.

New Trials

It has been a subject of a good deal of controversy in Eng. how far surprise at the trial ac., is a subject for a new trial - as a party being surprised by the introduction of unexpected testimony - which probably he might have answered had he but known it before

In Con. new trials have been granted on this ground. It seems that in Eng. it is not per se, a sufficient ground, tho' as an auxiliary, or under circumstances which recommend the propriety of the application it is good. 1 Bl Rep. 296? Com. Dig. Tri. C. 2. 2 Bl 791. 3 Dan 167. 222. 00. 2 Atk 319. Stra 691.

XII The absence of a material witness, through illness accident or sudden sickness - the infirmities of age or any undeserved corporeal harm - is another cause for new trial 6 Mod 22. 11 Mod 1. 5 Ba 252.

In this case however the Ct will not grant a new trial unless on the affidavit of the absent witness, or they may discover whether it is material or not Dal 545. 5 Ba 252.

In Con. whenever this ground the application is by petition, the petition must state the testimony of the witness. And before the granting of the petition the witness must testify on the hearing it read, what he knows -- that the Ct may determine whether it is material

2. If a material witness on one side is prevented from attending, by the fraud or act of the opposite party, a new trial will be granted. Thus if he would bribe him not to attend, and arrest or falsely imprison him - 11 Mod 141. 5 Ba 252.

3 But when the witness is wilfully absent or thro' his own negligence no new trial will be granted - & the Cts have in such

New Trials } in such cases refused to grant a new trial in new cause is to suffer the nations to be disappointed — The remedy is agt the witness, & the Cts encourage this manner of getting the remedy — but it may often be very precarious, the witness being unable to answer the damages.

But if he does not appear when it seems he was duly summond the Ct will grant a capias agt the witness — & in some cases will postpone the cause but will never grant a new trial. Sal 653. Barns 332, — 4 Ba 251.

3d And the Ct will never grant a new trial for the absence of a material witness when his testimony might have been attained by due diligence. It is not enough for the party by applying for a new trial merely to allege that there was a material witness absent from the former trial — for to this it is a sufficient answer to say he might have been obtained by due diligence — but he must allege that it was from inevitable accident of the part of the opposite party &c. Stra 691. 1 Wils 98. 6 Ca 194 2 Mod 22. Sal 647.

4 And a new trial is never granted upon the pretence that a material witness made a mistake, in giving in his evidence on the former trial & that he had some material fact that he might have testified to. The Cts deny every Appl[n] of this sort on the ground — on the ground that it would be dangerous to admit them; for there is no knowing to what it might be carried after the disappointed party has had an opportunity of examining with the witness — but it is the partys duty to have his witness well examined by his counsell before the trial — & if he does not it is his own wrong — this decided in Lond. as well as in Eng. 4 Ba 252. See post 28.

New Trials } XIII. The discovery of new material evidence
after trial, has been said for to be cause of a new trial — but
this does not appear to be Law, but the contrary is now held.
Ld Kenyon observed that motions on this ground have of late been
refused as often as made 12 Mod 584. 5 Ba 252. Pr Ch 194. 1 Wils 95
1 Bl R 84. 2 id 113. Sal 273. 7 Mo 269.

In Com. by St this is made sufficient ground for a new trial St-
tion 28. act civil. — But before the new trial will be granted the
Ct must be fully satisfied that the evidence is material and
discovered since the trial: For if it be material & it appear that
it was known to the party applying, before the trial, & that it
might have been known & obtained by due diligence — a new trial will nev-
er be granted him Kirb 282. 2 Swift 270.

The application in this
case must be made by petition & never by motion —; for the end
is supposed to have been discovered after the trial must be determ-
ined. But there might be a supposable case in wh-
ich the appl^n might be by motion. viz. when the evidence is
discovered after the trial & before the end of the term.

The Petition must state what the new evidence is
the nature & merits of the former trial, the evidence given on
the former trial, the names of the new witnesses that are
to be introduced, tho if there are certain witnesses named who
testify to this new evidence, other witnesses not named may be
adduced to testify to the same facts Kirby 288. 2 Swift 270.
If the testimony does not appear to be material the Petition is demurrable.

XIIII Another cause of a new trial is the improp-
er admission or rejection of witnesses.

If upon an objection taken to an
inadmissible witness he is admitted; or if proper one be rejected
the injured party may support a motion for a new trial Pa 82
194. 1 Burr 394-5

New Trials

2° And it has been said that if a cause was lost by the testimony of a witness legally infamous, a new trial ought to be granted. — This has been done in Chancery, — But the rule in the Ct of Law is different or, there Ct say that if there is an objection of this kind the party objecting should produce the evidence of it at the trial & then preclude him, but if this opportunity is not embraced the objn is waived.

It is obvious that there may be cases where this infamy was utterly unknown to the party he being a stranger — but the Ct takes no notice of it — but say he must run his chance, & if he objects at the trial, he must produce the evid. by which witness was rendered infamous — Formerly it was the case that the witness might be enquired of at the trial "if he had been convicted of an infamous crime — But he cant be so enquired of now

But it has been determined in Eng, that the incompetency of a witness arising from Interest, is not per se sufft ground for a new trial, tho as an auxiliary it shall have weight 1 Bk 717. Peck Cond. 187.

In Conn.

the rule is directly the reverse — here it has been the practice to grant a new trial on the score of interest in the witness when it was unknown at the trial —

& it has been carried even further & decided, that when a witness was of infamous moral character — as not being a man of ordinary veracity, a new trial may be granted, & this you will observe goes not to the legal competency, or admissibility of the witness — but to his credit, this must have been discovered after the trial

XIV — The misconduct of the parties is another cause for a new trial — This had so far as it respects any collusion or tampering with the jury has been before considered pa

When the party tampers with the jury or any one of the jurors, or

New Trials } or makes any misrepresentations to, or exercises any undue influence upon the jury, if the verdict is in his favor, it is cause of new trial Moore 452. 2 Roll 716. 5 Ba 92.

Ibem also considered the misconduct of the party in keeping away the witness of the opposite party (supra) this is two fold — the fraud of the opposite party — & the absence of the witness 11 Mod 141.

Any improper practices by the parties & their have the same effect as if committed by the party himself — As when the A Attorney wrote letters to one or two of the jurors stating the hardship of his clients case, & urging them to be present. the verdict was in his clients favor & a new trial was granted 2 Vent 173., 5 Ba 252-3.

And in short any sort of embracery practiced by the party or his counsell for whom the verdict is rendered, vitiates the verdict & is cause of a new trial

By "embracery" is meant any species of practice or management to influence the jury or a juror committed by the party or his counsell 11 Mod 119. 1 Vent 125. 5 Ba 252

It was formerly a rule in Eng. that a new trial was not to be granted in any act of Gentlemen ent under any circumstances; for the judgt in Giot is never conclusive — the reason why this judgt is inconclusive is that the proceedings are fictitious therefore the party might always make a fictitious case & then bring a new action Sal 650 5 Ba 252.

This rule however could never apply to the practice of Cos. for here the proceedings are not fictitious, therefore no need for a new action for the judgt is as conclusive in this as in any the actions.

New Trials

But the Eng. rule has been modified of late — so that it now is — if the verdict is for the Plff a new trial may as well be granted as in any other case — but not often for Deft unless under very special reasons — The reason of the rule is that when the verdict is for Plff, Deft is often put out of possession, & it is thought hard he should be put out of possession & compelled to bring a new act.n when it would be a shorter & much less expensive remedy to move a new trial. But when the verdict is for Deft there is no change of possession 1 Burr 399. 4 Burr 2224.

It was formerly holden that after two similar verdicts by two diff.t juries in any action, a second new trial could not be granted, however improper or corrupt may have been the conduct of the jury But this rule is now exploded & there are now cases where there have been 4, 5, 6 & 7 new trials in succession, one case of the kind occurd in Penn. essex vs Penn. 1 Lev 97. 1 Sid 131. 4 Burr 2108. 2 Bl 987. Sal 649. 6 Mod 22.

An ins gent a new trial is not granted for any cause, when the exception might have been taken at the trial, & was not then taken — If the party will not at the trial take an exception to an evidence &c. the presumption is that he waives it — for it is supposed that if the exception had been taken at the trial the judge would have had justice done him 10 Mod 202-3.

And as a Gen.l Rule (tho' many gen.l qualifications of it) it will not be granted a.t Deft in criminal cases, tho in many it is in favor of Deft who have been convicted — This originated not in any principle of the Law but in its benignity — that a man cant be tried twice for the same offence when he has been acquitted — & the 2.d trial is in favorem vitae 2 Stra 899. 1238. 1 Wils 17. 3 Inst 99. Cro 97. 1 Root 86-7.

New Trials

And the rule is universal in Eng. that in crim. pros. for offences higher than misdemeanours i.e. for felonies, no new trials on either side can be granted under any circumstances. In such cases the remedy for a conviction agst evidence &c is the trust in the clemency of the Crown - & this is deemed sufft. For in all such cases in which there would have been cause for a new trial had the case been civil, the prisoner will be recommended to the clemency of the Crown.

In Con. new trials are grantable in favor of Defts & have been granted even in capital cases. but never in favor of the State. And this has been done in the U.S. Circt Cts.

But both in Eng & Con where the cause is for an offence not higher than a misdemeanour i.e. when it is lower than capital. there it may grant a new trial as in civil cases and for the same reasons — case Perjury & Libel. 6 Mod 238. Stra 968 2 Ray 63. Stra 1102. 5 Burr 2689. Doug 760. 1 East 159.

And in these cases the genl rule is as first laid down - that a new trial cant be granted agst Deft, tho' it may be for him Stra 899. 101. 1238. 1 Sid 154. 1 Lev 124. 2 Ray 63. 2 Mod 484. 1 Wils 17. 3 Wils 59.

This rule however seems now confined to strictly public prosecutions or crim. pros. or where the pros. is by indictment or information; For of late new trials are granted even against Defts in actions or penal Sts - for any mistake of the judge in point of Law. The distinction is taken from the form of the process — so that when the act is crim[l] no new trial is granted agst Deft - but when it is civil as for Debt on penal bond; it is granted. But it does not seem that in such cases a new trial has ever been granted to Deft for

New Trials } for verdict against evidence 4 DR 753. 5 DR 20
2 Carr 451. The following cases are where V. verdict was against
evidence 5 DR 20. 4 id 758; 2 Mor. Dig. 108. 1 Wils 17. 3 Wils 59. Stra
899. 1238.

And a new trial may be granted against Defft
even on an indictment, if he has practiced any fraud to
obtain his acquittal — but I believe it has been granted in
no other cases — The frauds are such as tampering with
the jury — or frauds of any kind against the Court — but
never granted for a verdict agt evidence or for a mistake
of the judge Stra 1238. Sal 646. 12 Mod 9. 1 Show 96
Sal 646. 1 Root 93.
And even this rule has been denied, however if to
be well settled, you may see the contra opinion in 1 Ld
124 cited L Ray 63.

And when even the prosecution is "qui
tam", if the circumstances are such that a new trial
according to the distinctions taken as to the criminal
part, cant be granted, it cant as to the civil. As in
an action that inflicts a fine, or imprisonment or
any punishment & also a propes damages — Now here
the damages are civil & the punishment is criml. Now
if the circumstances were such that a new trial might
be granted as the civil part & not as to the criminal, it
cant be granted as to either — In the new trial cant
be as to part only — it must be as to the whole.

I have
already observed that in Ecc. a new trial may be granted
after the sentence. The grant of a New Trial when con-
ditional vacates the sentence & the rights of the
parties are to be determined by the final judgt.

New Trials } It has been determined in Com. that Petitions for a new trial are within the 1st of Amendment as to the death of the parties i.e. the death of the party does not destroy the petition, when it would not destroy the right of action. Ld Const. Amendt.

With regard to the Costs on a new trial I have to observe that in Eng. when the costs are directed to abide the event of final judgt. If the party who was successful in the first does also prevail in the second he obtains the costs of both. But if he who moves the second succeeds on the second he recovers the costs of the second only. And the costs of the first trial are awarded to neither party 8 Jr 619. 1 Abr 639. 641. 3 Jr 307.

Finis

116.34

Evidence.

by Judge Gould

The admissibility of evidence is always matter of law & of course must always be settled by the Ct. But the credibility & weight of evidence, & whether it goes to establish the issue or not is matter of fact & must be settled by the jury 2 Wheat 246. Bay 360. 1 Park. Ford 11 U.S. Thus in an act. of slander or public prosecution for a battery, the question whether defendant can have a previous threat to beat, or the fact of the defts must be decided by the Ct. But this admissibility being decided, its credibility & sufficiency to establish the issue must be decided by the jury. Seems then that as to the evidence there are two questions, first the admissibility is preliminary. This is a general rule

When however a record is put immediately in issue by a plea of such that record, the weight & effect of it as well as its admissibility are to be determined by the Ct. & indeed in such cases the plea comes down to the Ct & never to the jury, & whether is such a record or not must always be found by the Ct. for a record is of too high a nature to be tried by other than the Ct. or indeed than itself. 2 Wh. 336. 6 Ve 53. 1 Dust 114. 250. Laws 145. 148. 226.

Bay 82 a record is of too high a nature to be tried by any thing, but itself. I see I wish above, that in cases of the admiss &c. the Ct try every question of fact as well as of law.

law, the they approve on the jury as an instrument to ascertain the facts. Thus there are a multitude of different trials at L.L. as the wager of law, the trial by battel, trial by inspection as in cases of Dedamey, trial by certificate as in cases of Marriage; hence the supposition that the trial of a record is by itself is erroneous

When however a record is introduced incidentally & collateraly on an issue concluded to the jury it is to be read in evidence to them, tho it may be conclusive as to the fact it imports to establish, Thus Plff in ejectment introduces a judgt & exn in evidn of his title; They are to be read to the jury; tho were the existence of the recd put in issue by plea of nul tiel record, wch is the only plea wch puts it in issue, it wd be tried by the Ct alone, when introduced under any other plea as nil debet, non est factum &c. it is to be read &c. So that the treatment of a record depends upon the form of the issue Bak. L. & S.

Neither of the parties is bound to prove those facts in his case wch are not denied by the other party. for such parts of the pleadings on the one side as are not denied by the other, are of course admitted to be true; Thus if there is a decln stating several facts & defendt denies but one, he of course admits all the rest. the rule is that all traversable allegations not traversed are admitted. 4 Bac L. 73. 2 Ger 183. Bull. N.P. 298.

cond an admission on the record by one of the parties of any allegation of the other side

side precludes the former, i.e. him making the admission from denying the allegation at the trial - for no party shall deny that at the trial w.h he has admitted on the rec.d in the plead.gs - So as one party is not bound to prove that wh is not denied on the record or is admitted the other is not allowed to retract his admission or deny it in evidence Lawes. 116. Bul.N.P.282. 2 Mod 6. 4 Bac a.

The onus probandi lies regularly on that party who takes the affirmative of the issue, because in gen.l a mere negative is not susceptible of direct & positive proof tho it is true it will sometimes admit of the most positive proof - hence it is that he who alledges the existence of a fact, must prove its existence, & the other is not obliged to prove that it does not exist. Rak 6. 2. Phil. N.P. 299. 8. 15. R 144. 649. 4 ib 33. 3 d. Phillipps Evid.e 150.

There is an Exception to this rule when one is pros.d for not doing an act which by law he is bound to do. - in this case the party pros.d & alledg.g the negative takes the burthen of proof. for to presume the negative here wd be to presume guilt wh the law never does 'till it is proved. - & this exception holds as well in civil as in criminal cases, as if a town is obliged to repair a bridge is prosecuted for not repairg it is not alliged to prove that proper repairs were made, but pros.r must prove that they were not made the facility of proving the negative is not at allenged in these cases. Gilb. C. 148. 3 East. 192. 10 ib 216. 2 Ld. Ray. 851. Comb. 57. 2 Comyns. 654. 4 Hill. 151. Upon this principle

here

Evidence] here is a manifest diff. between this & cases in gen. l., As if a man is prosd. for theft he is never obliged to prove he is not guilty; the prin. is the same in both cases.

Again, If issue is taken on the life or death of a party once existing, the onus prob. lies on him alleging the death, and in this case I think the rule does not depend upon the mere form of the issue, but on the substance i.e. the onus will fall on him whether the alleg. is in affirmative or negative as "J.S. is dead," or "J.S. is not living" - for the legal presumption is that a person once living, continues so, unless there is direct or presumptive evid.e apparent, to the contrary, & if A sues as heir to J.S. he must shew that J.S. is dead for none eat heave viventis, def.t need not prove that J.S. is living. This issue on the death of a person is often joined, as in cases of devises, legacies, - for non-joinder of a party &c. But the rule I state it is without exception. Peak 213. 2 Roll Rep. 461. 2 Eath. 312. Phill. 152.

When however a person once existing has been absent seven years unheard of, the law presumes him to be dead. This positive rule was first introduced by a St of Jas. 1st relating to bigamy. That the party at home might sue for, or bring again after that period the rule has been gradually extended by analogies till now it reaches all the subjects of the law, & has been adopted by most nations; after this period, the burthen of proof is thrown upon the party affirming that J.S. is alive; but it knows no exception to,

to the rule above, for this presumption amounts to proof of P.S. death, whence it follows that the other party must relist. in 5 East 80, 85. 2 Camp 113 Phill 152.

So also when a legal marriage is proved, between the persons, the children born during the coverture or within a competent time afterwards are presumed to be legitimate, unless the contra appears. Here strictly speaking the onus probi. falls upon the party who asserts the negative; for suppose on bom showing of a feme covert playing lawful wife took claims as heir to her baron, he must make out his title, - but it is in capite for him to proof that he is legitimate; but in presumption of law he does it. & thus throws the onus probi upon his opponent. Phill. 112. 152. -

No other evidence is received on a point or matter of fact in issue than such is pertinent to the issue or matter of fact in dispute; any other evidence is in law termed irrelevant. ie. in com. language imdative inapplicable, & is therefore inadmissable as it tendeth not to prove or disprove the issue Buk 6. 2 Wils 205. -

Since it is, that the character of either party in a civil action cannot be called in question unless it is put in issue by the proceedings itself, now, what is meant by thus putting the character in issue, we are not informed by the books, the subject is there treated of merely by examples. But state it, that all that is meant is, that the character cannot be called in question unless it con-

cerns.

Evid. in Jeu. 2 endeavors to prove or disprove some matter of fact in issue, & when it thus endeavors ye character is said "to be put in issue" Bul. N. P. 296. Phill. 139. Peak. 7. 6. Thus in case of forgery, the deft's character is not in issue, for if is not at liberty to prove deft a knave for proof that he is a knave does not endeavor at all to prove that he was guilty of the charges in the declr., so in case for slander deft shall not be allowed to prove that deft bears the character of a defamer, for it does not prove that he defamed the Plff. in the case.

Nor is deft in such cases allowed to support his character by evidence, as in Actions, &c. for a battery it is not competent for deft to prove that he is a person civilly disposed or if sued in slander he cannot prove that he does not bear the character of man addicted to slander, for this no more endeavors to support his side of the issue than proof of the contra does that of his opponent. Bul. N. P. 296. Swift v. 6. 140. Peak. 6. Phill 139. 2 Bos & Pul. 532. N. 8 Cains 40.

But the character is in some civil cases put in issue by the proceeding & suits in such cases the character of the party may be enquired into, as in an act. per quod cons. by Husb. of Plff. for seducing his wife, deft may prove her gen. character even particular acts of incontinency with other persons to his interrogatories in mitigation of damages, for here the suit being for the seduction & violation of the chastity of the wife, it is directly in issue; her gen. character may then be proved, for it wd. be an abuse of language to talk of seducing a com. prostitute Bull. N. P. 296. Lilw. N. P. 601.

4 Esp. 65. Gilb. E. 113. Phill 199. Peak 7. 2 Esp. Cas 562. -

But in this case defft is not allowed to prove instances of the Wife's misconduct subsequent to his own intercourse with her, for his act may have induced & probably has induced her subsequent prostitution. 2 Esp. Cas 562. 1 Selw. N. Phill 199.

So also in an act. for breach of marriage promise, the defft is allowed in mitigation of damages to impeach Plffs gen. character & prove instances of her wanton conduct. for here Plffs character is put in issue, 1 Selw. N. 3 Mass Rep. 159. 3 Esp. Cas 236. 1 Johns. Cas 116. Ch. Comm. in a case wh came before the Supr. Ct about three years ago, it was decided that defft might impeach the character of Plffs not only in a civil but even in a moral point of view, & prove any instances of immorality as they do be pleased. This rule is not known in any further than above stated, but I think the Comm. will doubtless be a good one, & with a well regulated mind, these grounds wd be a serious objection to a wife. Wilcox vs. Hobbins, 1 Mass Rep

and here too it has been holden that when Plffs has received Plffs evidence agt. her gen. character, within the time of making the promise & the breach of it, shall not be admitted for defts own act may have contributed if not caused her loss of character. The reason is that such evid. may be admitted, but not when Plffs has been guilty, as Mass. Rep. 199. The distinction has been overlooked in N York 1 Johns. Cas 116. But I believe in no other States, & I think the distinction a correct one.

So also in an act. by a Parent or

or Masters for seducing a daughter or female servant, for good conduct and misconduct may impeach the damages gen'l character, for chastity & pure conduct, in mitigation of damages. 1 Root 472. 2 Wils 19.

But it may be asked how does this evidence affect the action, as the gist of it is a loss of service & Answer that the loss of service tho the nominal is not the real ground of action but the wounded affections & injury to reputation is the real rule of damages. There must however be some loss of service, but there are cases in wh the most aggravated damages have been given, where the loss of service was the most insignificant. Esp. D. 6 45. 2 Wils 19. Laws. 67. 8. 11 East 23 & 5. 2 Selw 1087.

In act[n] of Slander it is the constant practice in Comm. to permit the deft, to impeach, in mitigation of damages, the character of pltff as to the particular fact or species of crime charged by the words said; But I find nothing in the Eng[h] books wh allow this. Thus in an act[n] on the case in Tort for charging pltff of theft, deft in Comm may in mitig[n] of damg[s] prove that pltff has the reputation of being a thief — & so of other charges in diff[t] cases — For here as above the character of pltff is not in issue; I don't know that this case has arisen in any other of the States. except N.Y. where the Court was equally divided 1 Johns 46. 1 Root. 354. 456.

There is one case in the Eng. books in wh this evidence is admitted but the case is sui generis. It is where loss of particular friends has occurred in consequence of slander, viz. [illegible] where the special Damage, deft may prove

prove that Plff's gen[l] character is bad. Evidence in gen[l] the crime charged as laid in the decl[n] 2 Barn & Ald. 256. 1 Leach 264. Phill 141. vide 6 Mod. Rep. 64. 3 Ld 553.

In Slander Plff. may in aggrav[n] of damages, give in evid[ce] his rank and condition of life, and tho' it does not appear that this precise rule has been adopted in Eng. still it is reasonable, for words spoken of Clergyman, for instance may cause much more injury than they w[d] if spoken of any other person. 2 Mod. R. 257. Phill 141 Am.

can on the other hand deft may adduce evid[ce] of the same kind in mitig[n] of damages. ib. ace.

On an act[n] for malicious Prosecution deft may shew Plff's gen[l] character & he can by way of shewing probable cause for here the existence of probable cause is a justification as it was in "maliciously & without probable cause" suing him for this here proof of Plff's gen[l] reputation for the theft wd shew the prob. cause & relieve at least the presumption of malice - See ag[n] you perceive the character is put directly in issue as is the subject in wh it is attached 2 Esp. Cas. 720. - Phill 139.

In crim[l] cases in wh deft's character is put in issue by the pros[n] the Pros[r] may attack his general character by proof of particular facts for otherwise as you will see post it w[d] be impossible to support the charge a Pros[n] R. N. P. 296. 1 Mc Nal 324. Peake 9.

Now what are the cases in wh deft's character is put in

in issue by the pros: ? There is no discussion to be found in any of the books upon this title, but from the cases, I think the following will be found to be correct, viz: in pros: for the def: character in issue, within the meaning of the rule, only when it charges a habit or course of conduct, as contradistinguished from an individual or specific act. Thus an indictm: for keeping a lewd house charges a course of conduct or habit & not a particular act of lewdness merely. Here pros: may charge & prove particular acts on instances of lewdness. & so in an indictm: for being a com: barrator, as it charges an habit of supporting unlawful suits, partic: cases may be proved. & so also on an indictm: for the com: law offence of being a com: scold; the only remarkable case of wh kind on either any recollection, is one wh occured at Boston

But an indictm: for theft, forgery, swindling &c. does not put the def: character in issue within the rule, for the rule does not contemplate def: moral character, & the indictm: here is for a particular fact. The forgery for instance or that pros: can prove only the partic: case alleged in the ind: or indict: & cannot prove def: gen: character.

In the case of an indictment of a com: barrator Lawyer, pros: is not allowed to prove particular facts unless he gives def: previous notice of them, for as these pros: are usually ag: Lawyers, who become com: barrators, & it is the business of Lawyers to bring suits, def: cannot know on what suits pros: intends to

body, as he cannot a retain it from the Jury.
This case does not hold with any other cases, & indeed
this manifestly differs from the other as that of the
com[th] vs old &c. Bul. N.P. 296. 1 Hen[s] Mod. 324. Bak. 7. —

But on the other hand, if the Pros[r] does not put
the defts character in issue, Pros[r] cannot examine
into his character either as to particular facts or general
character, unless deft has exhibited evidence in support
of his character. Bul. N.P. 296. 1 Hen[s] Mod. 324. A more particular
& precise reason is that a partic[r] fact & not the gen[l] character
is here put in issue As if deft is charged with forging a
note, his offence consists in forging that partic[r] note,

& can here if deft opens the enquiry by offering evid[ce]
& character, still the Pros[r] cannot give
evid[ce] as to partic[r] facts but only as to gen[l] character
being a thief; deft offers proof of his character for honesty
Pros[r] may here prove his character as a thief but he cannot
be allowed to prove that deft has committed any
other theft than the one in issue, for deft has no
notice, & when the fact is not put in issue there
can be no legal notice. 1 Hen[s] Mod 324. Bul N.P. 296.
Bak 7. 8.

In cases in which defts character is not put in
issue in crim[l] Pros[ns] he is indulged in proving his own
good character, but Pros[r] cannot prove his bad. How
upon the strict rules of evid[ce] there is diff[ce] between the
cases as the evid[ce] offered by deft confines no more to
prove the matter in issue that the contra evidence

evidence upon oath &c. &c. — & the same is founded mainly on the benignity of the law & seems reasonable & calculated to answer the ends of the law of evidence. 1 Mc Nal. 320, 322. Phill 140. But q., How if one is indicted for theft, & cannot in the first instance show that he has a reputation for honesty, but may show that his reputation for honesty is good. & so in case of perjury, forgery &c &c.

This evidence was formerly allowed in general in capital cases in favorem vitæ But it is now extended to cases not capital as misdemeanours provided it is the direct object of the prosecution to punish an offence & not merely to collect a penalty. 1 Mc Nal 320. 2 Bac Ab 532 n. Peake. Phill. 132.

But art is not thus indulged in actions or informations for mere penalties inflicted by penal statutes — for these are not regarded as prosecutions purely criminal or as prosecutions set for crimes but merely as actions to collect a sum of money, & here he cannot give evidence of his good character. Secus if indicted at C L.
Mr Peake indeed observes in his treatise on evidence that the indulgence extends to no other cases than those in which the prosecution is to inflict a corporal punishment but the case he quotes (2 Bac Ab 532) does not support him in this general proposition, & there are cases directly opposed to it. Peake. see contra 2 Mc Nal 320. 1. 2. Phill 140.

So also on an indictment for a rape, art may give in evidence that the woman's character was notoriously bad, or that he himself previously had had criminal intercourse with her

but it is not at liberty to prove any such intercourse between her and another person, This is admitted because it goes to diminish the probability of love; but the intercourse between her & another does not go to diminish this probability Phill 146.

The evid. in support of deft. character in a crim. pros. may be special as well as gen. i.e. the witnesses may not only testify as to his gen. character but they may also give their reasons for their opinions & more particular instances of his good conduct. But evid. ag. him can be only gen. not particular. It cannot be particular because deft cannot be supposed to be prepared to answer, to every fact which may be alledged ag. him 1 Mc Nal. 320. & 4. Rule. N. P. 245.

It may here be observed however, that in cases in wh. the evid. of guilt is very weak & merely presumptive proof of deft good character may be very important. yet in a positive & direct & positive evidence it is in gen. of very little avail, When the evid. is doubtful, that of good character, may often be sufft. on wh. to ground an acquittal. Phill 146. Rak v. 2 Mass. Rep. 317.

2. How Gen. Rule, and 2. in my first application is, That the best evid. wh. the nature of the case admits of must be produced, this holding evid. of a higher & primary nature, & prevents inferior & secondary evid. raises the presumption that if the primary evid. was introduced it wd. show something wh. ag. him introducing the latter. The meaning of the rule is that secondary evid. cannot be admitted when there is higher in the

the power of law producing evid.ce Peak 102. 1 Am.a Mal. 344.
Thus if a party wishes to prove the contents of a written instrument which is in existence & in his own custody the instrument itself must be produced, & it is not competent for the party to prove the contents either by parol evid.ce or by a copy. — In case of the instrument being lost, &c. see post. — 10 Co. 93. 1 Am.a Mal 356. 7. 360. 2d 1 Ves. Peak 9.

Upon the same principle if an instrument is attested by a subscribing witness, the execution of it can be proved regularly by no other person, or evid.ce be given the parties themselves have chosen & attest it, it is presumed that he is the best evid.ce, & if it does not appear that this witness is dead not in a situation to be produced in Ct it is to be proved by no other means. Dy. D 265. Doug 205. or 216. 4 East 58. 2 id 183. 1 Esp. Cas. 89.

But the law does not require that all the evid.ce that can be produced shall be produced, hence if there are two or more subscribing witnesses to a deed it may be proved by the testimony of one of them. Peak 9. Swift Ev. 2. 8.

On gen.l no specified number of witnesses is necess. at C.L. to establish any fact, the gen.l Rule is that such evid.ce as satisfies the trier is sufft. to support any issue of course one credible witness is all that the law requires 1 Swat 66. Coxe 144. 1 Show 156. 1 Am.a Mal 16. Phill 107.

But this rule is by no means universal thus in perjury for Burglary two witnesses are necessy to a conviction, for if there is but one witness

in support of the pros[n]. there will be but one oath ag[st] his oath, as it is termed i.e. the oath of one person ag[st] the oath of another, as on diff[t] sides of a case, for def[t] when he took the oath complained of was as competent a witness as any other, & is so considered now, as the law presumes no man guilty 'till proved &c. — This case is exemplified by the one which we might satisfy ourselves. 4 Bl 356. 10 Mod 194. 1 Mc Nal 33. 1 Phill 105.

The rule does not however absolutely require that there sh[d] be two witnesses testifying to the same fact. But it requires that there sh[d] be some independant evid[ce] in add[n] to the testim[y] of one witness 1 Phill 105.

On pros[n] for high Treason. petit Treason & misprision of treason two witnesses or confession are required to a conviction by St. 1 Ed 6. & several other St. The rule is a St rule & does not extend to any species of treason as for counterfeiting the coin or the kings signet, privy or great seal sign manual &c. — in these cases one witness is sufft. 4 Bl 356. 1 Hawk P.C. Ch. 46 Sect. 6. Cas. 24 & 45. 2 Mc Nal 15 to 21. 1 Phill 84 & 105. — That this was not the law rule at C.L see 2 Haw P.C. ch. 25. sec. 129. 3 Inst 26. 1 Mc Nal 16. 91. Phill 105. It is contended by Ld Coke 3 Inst. 26 that it was the C.L. But the current of authority is ag[st] him; It is a question of some importance in some of the States, & not one of mere speculation as then by St Law not law universally adopted

It is required by 8 & 9 W[m] 3 that both the witnesses testify to an overt act it does not require that they testify to the same overt act

Best. Evid. Treason 5. act, but they must be on an overt act and a person cannot without such testimony be convicted of high treason unless on his confession in open Ct 4 Bl 357. 1 Mc Nal 21. 34.

But by the Constitution of the U.S. not only two witnesses are required to testify but they must both testify to the same overt act, & if there is no such testimony there can be no conviction except by confession in open Ct. Const. U.S. Art. 3. sec 3.

This rule however requiring two witnesses in cases of high treason extends only to overt acts, collateral facts may be proved by one witness as any fact may be in other cases. Thus if in the U.S. one is indicted as a citizen of the U.S. for waging war ag. the U.S. one witness is sufficient to prove him a citizen, his parentage, birth &c for these are collateral facts, the two are requisite to prove the overt act. his waging war &c — East. C. Cas. 240. 5 State Tri. 634. 1 Mc Nal 34. 35. 268.

And a similar rule obtains in cases of perjury, I observed that two witnesses were required to prove the perjury i.e. that the oath was false, but one is sufficient to prove that who took the oath. 1 Mc Nal. 37.

It is also a rule in Ch. founded on the rule as to perjury, that if the defts answer is contradicted by only one witness the Plff cannot have a decree for the answer it self is made under oath, as that of the one witness against it, & is but oath against oath 1 Vern 161. 1 Vez 65. 95. Pr. Ch. 19. 2 Dow 6 216. Bull N.

U.S. 455. Devth 646. 21 Ey 93. 448. 9 Ves 522.

In the 6th Spanish of Comm, the answer is not made under oath. I take it this rule cannot prevail, & I presume an affirm. has never been made to apply it

By a St of Comm. "no man shall be convicted of any capital crime whatever" but on the testimony of two or three wits. or what is equivalent to it" St Com 685.

This last suspicion is very doubtful, but in the construction of the St. it is now established that it is not necessary that the two wits. shd testify to the same fact or facts, but one may testify to one fact & the other to another or both to diff. parts of the same transaction, or one to give direct evid. & the other circumstantial, & if so or both may testify to circumstantial evid. & if the evid. is credible & satisfactory to the jury they are at liberty to convict under the St.

All testimony in a St of Justice is regularly given under oath, the decl. of strangers that is, persons not party to the suit are regularly no evidence unless made in Ct & under oath & hence it is that even if a Judge or Juror is acquainted with any of the facts in issue he cannot act as evid. to his knowledge unless sworn as other wits. are. 1 Rev. 146. 2 Mod 99. Peak 10.

It follows also that Hearsay Evid. is in general inadmissable. By Hearsay Evid. is meant the testimony of one person of what he has heard another say.

Hearsay Evid.ce say, It is inadmissable for two reasons. 1st. The witness does not testify to the fact in question but to the decl.ns of another person respecting that fact. 2d a decl.n not made in Ct upon oath as is required. 2d There can be no cross examination as to the fact but only as to the decl.n & this is an objection held in com.n Law Cases 2 Roll. Rep. 10. 11. Phill. 193. Bull. N.P. 274. 3 P.R. 721. 2 East. 27. 54.

This Gen.l rule as to the Evid.ce however admits of exception when the fact in question is in its nature or in com.n presumption is not capable of direct & positive proof. i.e. This admission must be as it is admitted upon questions relative to customs prescriptions & pedigrees for evid.ce of them is to be obtained only from hearsay & com.n reputation. Bull. N.P. 294. 1 Mc.Nal 303. Esp. L. 198. Evidence. Thus on a quest.n of custom or prescription, Hearsay Evid.ce may be admitted to prove the com.n reputation, or the decl.ns of deceased persons respecting it, for this is often the only evid.ce that can be obtained. But witness will not be allowed here to relate any thing which the deceased person may have said respecting the exercise of that right, but it can testify only to the right. Thus quest.n as to a right of way by cust.m or prescr.n M.E. of deceased persons admitted as to the existence of the right, but not as to particular facts shewing the exercise of that right — for these facts may be proved by better evid.ce Peak Ev. 106. 5 Ib. 26. 31. 2 Vez. 544. 2 East. 62. 14 Ib. 327. 331.

Hence upon a quest.n respecting ancient boundaries, Witness may state what have been the reputed boundaries of the farm town &c & what deceased persons have

have said respecting those boundaries, but not with those dec.ns persons might have said respecting a bank & a monument a wall existing so &c. — for this wd be evid.ce of a particular fact & not of com.n reputation, & what it may evid.ce can be admitted only as the evid.ce of reputation. 2 D. 53. 14 East 331 n. Phill 194. 3. Peak C. ch. 67.

Upon the same prin. evid.ce of reputation is admissable respecting the right of way, but here as in the former case witness cannot testify what declarations have said respecting the existence of a fact cognizable by the senses. Bull. N.P. 295.

So on a quest.n whether such a piece of land was formerly part of such an estate, the decl.ns of declarants have been proved 2 Ld. Ray 934. Phill 182. 2. E. 53.

So also the decl.ns of deceased parishioners made when no diff.ce existed between the parishes may be proved with reg.d to the boundaries of the Parishes. Peak. C. 33.

And it is a rule which occurs in daily experience, that the decl.ns of a declarant owner of land respecting matters within the limits of it, may be given in evid.ce ag.t those who claim under him as ag.t his heir, — But his decl.ns in his own favour, extending the limits cannot be given in evid.ce. — This is on the prin.le that a man's confession may be taken ag.t himself, but not in his favour. — The same rule holds as to the decl.ns of declarants, in ascertaining the boundaries of grants, 5 T.R. 123.

Hearsay Evid.

On questions of Pedigree the general rule that Hearsay evid.ce is not admissable, is more relaxed than upon any other subject whatever, Here the decl.ns of deceased persons who from their situations were likely to know the facts in question may be given in evid.ce - for frequently the pedigree can be proved in no other way, as on a quest.n whether A. is legit.te or not the decl.ns of either his deceased father or mother may be given in evid.ce as to his being born within wedlock or consistent time afterwards, or not Cowp 590. 3 T.R. 759. 6 id 330. 2 Ray 854. 10 East 120. Bull. N.P. 112, 294.

But the declarations of decl.ns relatives are admissable in these cases only when they are supposed to be made without interest or bias in the relative making them - For if the decl.ns relative had made the decl.ns in contemplation of a suit or after one had been commenced between his relative & another, the decl.ns are not to be proved in evid.ce for it being in favour of his relative, But this subject there is a contrariety of opinion yet it is contended that the evid.ce shd be admitted & then the question as to its credibility referred to the jury, But the contra seems to be the better opinion Know the case. Phill 196. 2 Vin. Abr. Evid.ce C. pl. 14. East. 291. Cowp. 594. 1 Selw. N.P. 284. 3 Camp. 444.

The decl.ns of decd parents shall not be admitted to prove non-access during wedlock & thus bastardize the issue of the bed, as in a quest.n whether A is heir of J.S. the decl.ns of J.S. - of his wife shall not be admitted

to

to prove non access at the proper time or during such
such, this is forbidden from consideration of decency
morality & policy — Parents shall not thus bastardize
their issue born during wedlock tho they
may thereby bastardize + if they were allowed their evidence
to the former point it is not to be received. Cowp 594 1 Ld Raym 562 Salk 120. Esp 436. 8 East 203. 11 Ves 132.

But the
decl.ns of a mere stranger or casual neighbour is not ad-
missable on a question of pedigree for they are not supposed
to be possessed of the best means of knowledge. 3 Esp. 423. 1
Mc Nal 314. 13 Ves 144. 514. 14 East 330.

But it seems that the decl.ns
of a deceased Surgeon as to the time of a birth w.h he attended
in his professional character, as may also a
memorandum of the birth made by him at the time
may be proved, on a question of legitimacy Phill 161.
10 East 120. Vin Ab. Evid.ce C. B. 91.

But tho the decl.ns of a deceased
stranger is not admissable on a quest.n of pedigree, still
the common reputation of the neighbourhood is admissable
A portion thereof the reputation of the family is admiss.ble
Wms be sufficient then to prove in a quest.n of legit.cy that A.
was reputed to be the son of Jos Peak Esq.

In all these
cases of hearsay or the decl.ns of others, they cannot be admi-
tted if he who made the decl.n is living & can be
produced in but in such case he shd. himself be produced
& if the question is, to whom the legitimate child of Jos. deceased now if
he is dead his decl.n can be proved as evidence But if he is living

Hearsay Evid[ce] Living in a situation to be produced
& it must be looked in, So that all the cases
above allowing the declarations of persons to be read
as evid[ce] proceed upon those that the persons making
are dead. 2 Stra 994. B.R.L. 113. 3 Campb. 459. Phill 146.

But to prove the state of a family (I speak not
of the direct question of legit[cy]) as to marriage births
deaths &c the decl[s] of any dec[d] person likely to know
the fact & the belief of the family are good evid[ce] as
Dec. who was the wife of J. Law many children they
had, what were their names how many of each
sex & whether each or one died abroad &c. — B.R.L. 294.
295. Cas. D. 738. 785. Peak 12.

And indeed for this purpose
the recital in a Deed or Special verdict of the fact
ignee, an answer to a bill in Ch[y]. a Will made
by an ancestor, though cancelled, Memorandums in the
family bible or other family record. Heralds books.
monumental inscriptions, engravings upon rings
& indeed any other kind of permanent record, that
originated with the family may be admitted in Ev[ce]
B.R.L. 294-5, Cas. D. 738. Phill 175-6. 11 East 505. 13 Ves. jr. 144.

But the place of one birth cannot be proved by
hearsay evidence, for this raises no question of pedigree
but a single point of locality to be proved of course
like any other ordinary fact. 2 East 538. 3 B.R. 407. Phill
180. 1 East 393. 2 East. 24. 64. 65. —

In treating of hearsay evid.ce I would observe that in some cases a memorandum in writing made by a deceased person at the time in question & in the ordinary course of his employment is with the other circumstances admitted in evid.ce - This tho not strictly hearsay evid.ce is in the nature of it As a mem.m made by a clerk or agent dec.d at the time of the delivery of goods by his Principal & made in the ord.y course of his business. But these cases depend so much upon their own particular circumstances that it is impossible to give a gen.l rule. Peak 14. Salk 285. 690. Stra 1149. - See examples of these mem.s Bul. N.P. 282. 3. Salk 285. 290.

But such memorandums is never of itself evid.ce unless the person who made it is dead. it is not admitted if he is alive even tho he be out of the reach of process as in a foreign country. Esp. Cas. Peak 15. 16.

But a mem.m or book entry made by the party himself is never of itself evid.ce tho it may be admitted as such in conveyance with & in corroboration of other testimony, as witness swore that he saw the articles delivered & entry made in his book, here the books are let into Ev. by way of stating witnesses evid.ce - And should the entry not appear in such case, the testim.y of the witness would be shaken. But the fact is the book is never received as evid.ce of the fact. Esp. Cas. 326. Peak 16. 15.

Hearsay Evid.ce

In crim.l cases the rule excluding hearsay evid.ce appears to be more strict than in civil cases. it may be admitted however in crim.l cases by way of inducement, or for the purpose of illustrating that wh. is proper evid.ce Thus on a pros.n of prisoner for an offence, the witness who is called to testify to a confession may by way of inducement prove that there was a report that def.t committed the offence, & that he (wit.s) charged prisoner with it & he confessed he did commit it, or was silent &c as the case may be & if prisoner has made a confession admitting a certain report or hearsay, witness may give proof of the report for the purpose of illustrating the confession, i.e. he may shew what the report was - for this is necessary that the Jury may know whether the confession of prisoner related to the matter reported 1 Mc Nal & G. 282. 297. 299. 301 B. N.P. 294

There is an important exception to this rule as to hearsay evid.ce in the case of murder, & so in other cases of homicide in gen.l viz. That the decl.n of the murdered made under the apprehension of death & relating to the commission of the offence, is admissable evid.ce As if def.t is indicted for the murder of C. the decl.n of B. charging A. with & exculpating him from the offence is admissable, - for the situation of the deceased is considered as creating a sanction to his words equal to that of the solemnity of an oath — This rule is laid down with relation to murder alone, but as the principle applies to all kinds of homicide, I take it the same does likewise Leach in C. C. 563. 7. also 494. 1 East. P. Cr.

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No 38. Evidence.

Hearsay Evid.ce 353. 1 Mc Nally 264 -

That the decl.n of persons
dying in expectation that they are not dismissable, and
indeed the decl.n of no person in extremis is dismiss-
able as evid.ce unless the oath of that person would
be allowed if living & sworn in a Ct of Justice, If
then an attainted felon shd be murdered & in
extremis shd declare that A.B. had murdered him
the decl.n wd not be given in evid.ce ag.st others. Leach C.
Cas. 208. or 246. 1 Mc Nally 89.

The decl.n of a person mortally
wounded tho' not under the apprehension of death
at the time is not dismissable, for the omission of
the words arising from the apprehension of death is
fatal in omitting Leach C. Cas. 304. 394. 563. 1 Mc Nal. 353. 383.

It is not necessary however, to render the decl.n dismiss-
able, that the person shd have expressed any ap-
prehension of approaching death. If from circum-
stances it can be collected that he was under this
apprehension it will be sufficient. From the authors
requisite. - 1 East. P.C. 353. Leach C. Cas. 563. 1 Mc Nal. 353. 383. -

It seems then that the question whether a
person was under this apprehension or not is one
for the determination of the Ct - This a question
as to the admissibility of evid.ce - The decision of the
Ct however is not here conclusive if they admit
hearsay decl.n, tho' if they reject it, it is conclusive,
for tho' omitted they will then decide upon it again

Leeway, Crim. Con. &c. again & denied or rejected at pleasure Leek & Cas. 563. 364. 399. 1 Mc Nal. 383. to 5.

Analogous to this is the case of C of a deed lost or destroyed by inevitable accident. & the analogy alone give it a place here. If a man will give evid.ce of the contents of a deed, no secondary evid.ce will be received until the orig.l is proved to be lost or destroyed, this question to be decided, if in the affirmative, then it is referred to the jury, & they are at liberty to consider & decide as upon the same matter on the ground of its credibility.

The dying decl.ns of deceased persons are admitted under the same limitations in civil cases, as in a quest.n as to a will's being genuine or not. the dying decl.ns of a deceased subscribing witness of the true will that he had himself destroyed the genuine will & forged the one in question, was admitted; 2 Bac. 1244. 1255. 6 East. 198. 1 Mc Nal. 356.

So also what a deceased person has before sworn before in an act.n between the same parties may be proved. but, it cannot be proved in an act.n between diff.t parties; - this is Leeway under oath. On this can state it the rule is the same if the cause of act.n between the same parties is diff.t or if it between those claim.g under the original parties. - this last is on the ground of privity of contract. - 1 Mc Nal 283. 3 Bl. R. 1 W. Blk. East 6. Law 399. 2 Bank 605. Bak 60. Kirby 259. this case manifestly differs from them alone as the decl.ns is here under oath

one w^t has been proved down - & accord-
-ing to ^ rule of ^ nquiry may be proved agt him upon
this trial, provided it appear that the procuring
the witness to abscond, or keeping the party
not having the witness present is the fault of
him w^m he would object to. the evid^ce of a witness
is not present. 2 Dia. Ab 665: 1. Mc Nac. & Gor. 6 Hub. 53: 1 East
P. C. 1 Root 76.

What one of the parties of the suit has said
as to the fact or matter in issue may always be
proved agt him by the other, for a mans own words
may at all times be proved agt himself, — but
a belief is not gen^ly called knowing, — it is evid^ce only
of what was spoken and of it 7 Pr R 663. Bak 16. Phill.
Evid^ce 91

Such a confession by a party however is not
conclusive agt him, he is still at liberty to prove the
case & his evid^ce to be false, the evid^ce of the party
here is not like the record. But he is as much at
liberty to deny it as any other fact. 1 Bl. R. 19. 4 Bingh
N.C. 297. 10 W. 39. Phill 74. 75 880.

But when the confession
of the party is to be thus proved, all that was said
upon the subject at the time must be disclosed in
evid^ce & not the mere confession itself the detached
part — for a part of a conversation or of a sentence will
bear a very different construction when taken by
itself from it will when accompanied with the
whole; But he cannot avail himself of any denial
or qualifying evid^ce he may have made afterwards
&c.

Always Evid. 3 if he once confesses & then denies he cannot take benefit of his denial, for then wd. be to make evid. for himself. 1 East 452. 2 Campb. 115. 1 ib 432. Phill. 79. 80. Dom. Ab. Evid 1813.

A party is never allowed to introduce his own declaration in writing for himself, except when it constitutes a part of the contr. or transaction. This goes in as part of the res gesta or matter in issue. Then he has a right to take advantage of the declarations made at the time, but not of those declarations made afterwards. for those do not constitute a part of the res gestae, eg. if a man draws a sword & strikes another & then says "now it not a fitting time to draw, now you shall!" here this declaration may be proved in an action of assault for the assault, for it is evidence he did not intend to strike at it was a fitting time. - But if this declaration had been made at a different time it would not have availed deft. — Cases of this kind are innumerable.
In cases of contracts the declarations made at the time of contracting after enter into the spirit of the contract.

In case of tender if one who owed deft or stood bound in a bond to pay at a day upon one of those bonds deft may plead the tender & prove his declarations made at the time of the tender, that he tendered the money upon bond (1751) 6. East 188. 1 Johns. 59. 1 Mod. 3. Deft 2 Vol. 1 Mc Nal 373. 375. 7. 1 Hawk. 138. The same rule holds in crim. as well as civil cases. It is true this evidence does not always avail, but still it is good evidence & the jury will attach to it its due degree of credibility. If deft had with a pistol in his hand begged a man's pocket book

Cook- def't might give proof of his supplementary words, but the jury will weigh them for what they are worth.

In case of mal. pros. an act. as a party to the suit has sworn in the former action may be proved in his favour in this; the ground of this act. is that the def't maliciously & without probable cause had caused him (plff.) to be tried &c. The reason of the rule is, that the prot. pros. usually institutes his pros. upon the information of some one & this one is used as a witness at the trial, this informer is then liable in failure of the pros. to an act. for mal. pros. & if he is not allowed to give proof of the evid. given by himself upon the former trial he may have no means of defence, as he may be the only person who is a witness of the facts which were the grounds, which constituted the probable cause for the indictment, - his justification. — This is an anomaly in the law of evid. 6 Mass. 215. 8 Mass. 214. Dyer 253, 336.

So also a confession out of Ct by a party really interested tho' not a party to the record, may be given in evid. ag. the party who represents him, thus in debt upon a bond & co conditioned to be paid to B, the confession of B. that the money had been paid to him will bar the action tho' the action is in the name of A. - for A. is here but a conduit pipe through wh the debt is to flow into the hands of B. 11 East 395. 11 ib. 578 6 Esp. 1 Wils 45. 3 Camp. 465. —

Ramsay } And what has been asserted by a Stranger agt the party intended, in his absence and not contradicted by him, is evid. agt him — for as the case may be the silence of the party may be construed in to a tacit confession. This evid. the jury will give its due weight — as it is always admissable evid. Peak 16. Swift, 6. 129. 129.

But the declaration of a Stranger, Servant, Child or Wife of the party in his absence is not regularly evidence agt him as if he be said in evidt. a bot. the wife cannot in his absence say that he did not make the one or acquitt of the other. But she may so in his presence & he not contradict her. he will be thereby precluded under the foregoing rule 2 Show 1094. 6 Mod R 660. Wills 549.

If an act is done by Husb & Wife in sight of the Wife as Deed a confession by her mode during coverture will not bind him for her acts would not. 6 Mod R 686.

So also in a Crim. Com. act. done by the Husb the confession of the Wife cannot be given agt the Husb for the act is his & the injury is his & she has no power to affect him by her confession. Wills 549.

So the confession of a Corporator of a Corporation aggregate is not evid. agt the Corporation, for in law the members are not considered as all but as by the legal body politic & Plow. 494. 3 Day 499. —

However where there is a dec.n of the wife as to a transaction mainly regulated by him with the husb.d consent & acc.e it may be evid.e ag.st him & in an act.n ag.st a father for the maintenance of his child, quest. was then a contr.y — It was proved that the wife said there was an agreement & pay so much per week & the evid.e was admitted ag.st husb.d, But this case stands as the rule is laid down more gen.y than & thus the case will warrant. Stra 527, 1 Bl. Ca. 102. 2 L. D. 921.

The admission or decl.n of a Serv.t or agent if made at the time of transacting his Principals business & in relation to it, may be proved in evid.e ag.st the Prin.l, they are proved in the case however not in the light of mere decl.ns but as part of transaction, of the res gesta. As if Agent. sold action a deed &c & as a reason the decl.n to that effect made at the time may be proved either for or ag.st his Prin.l as the case may be; So did agt in purchasing a defective article, answer to the information that it was defective, that he knew it & decl.n could be proved ag.st his Principal, & he claim damages. 2 Str 1155. 2 M & Chal 520. 626. Phill Ev & 4. 10 Dey 7. 127.

But the acknowledgment or decl.n of a Serv.t or agt made after the transaction & wh it relates is not evid.e ag.st his principal — for here it does not form a part of the res gesta But is on the footing of hearsay evid.e 7 T R 662. 662 Phill 75.

Hanway, Agent &c } 95. 77. 79. 2 Cab. Cas. 511 n. 5; 4th 714. 135. 2 Camp. 635. 10 Ves. Jr. 149.

The same distinction holds with respect to the decl^{ns} made by an Interpreter between two contracting parties of diff^{t} tongues; those decl^{ns} he makes at the time, may be proved, those not made at the time may not be proved 11 State Trials 191. Phill. Ev.

The decl^{ns} by a Bankrupt as to his motives for absconding made by him at the time of abscond^{g} is good evid^{e} on behalf of his assignees against his bankruptcy. 5. Esp. 132.

But note you Emile, That the decl^{ns} of third persons are good for nothing, except they be made at the time of the transaction, there are two exceptions when the case is on a policy of Insurance effected by the husband upon the life of his wife — for in an action brought upon the subsequent decl^{ns} of the wife as to her ill state of health at the time the Insur^{ce} was effected, may be proved in evid^{e} agst her husd^{d}; this is a case sui generis, & the reasons are peculiar; & that frequently the existence & even the nature of a complaint can be known only to the person subject to it — it dividing the world of the most skillful physician, — it becomes then a matter of necess^{y}, that y^{e} rule should abate, 6 East 196. Shinn 402. Phill. 191.

Upon the same principle, in a suit on either civil or crim^{l} for a battery, the decl^{ns} of

of the party injured including the bodily pain sustained by the injury is always admissable with ag.st deft & enhance the damages, & the rule holds in ac.n by the person injured, for the injury— but in these cases the decl.n must be made at the time of suffering, Root 88. Swift Evid.e 136.

When the party to a suit represents or stands in the place of another, the decl.n of the latter is evid.e ag.st the party to the suit, thus in an ac.n by Exr. for a duty claimed on behalf of Testator, the decl.n of Test.r that the duty has been discharged is good evid.e ag.st the Exr. for here & Exrs. claim merely by a derivative title, & as his Testator from whom he derives title would be defeated by proof of y.e decl.n were he alive, so shall the Exr. be,— It is the same thing as to the heir &c. Swift Ev 126.

So also in an ac.n ag.st the Sh.ff for an escape upon mesne process, the confession of the Escaper that he owed debt in the process may be proved in ac.n ag.st the Sh.ff for the escape for in this ac.n Sh.ff is liable for the duty due from the Escapor to Sh.ff, & now for this the Sh.ff has become liable Sh.ff may therefore ag.st him whatever he w.d have been permitted to prove ag.st deft. in the process— therefore he can prove deft's confession— Any this may be done when the escape is on mesne process— if it were mesne process. Still it might be proved when the escape was upon final process— but it would be evid.e in such case— for the debt is ascertained by the judgment 4 S & R 436, Oak Exr. 65.

Hearsay Evid.

The rule is the same when the action is brot. by the Sheriff in the nature of the Sheriff for a false return, as in an action for a wrongful & false return non est inventus, how here the Sheriff has an action against the Sheriff But the question returns is left in the power & under the Sheriff at all & the Sheriff to prove - this then the Sheriff may prove his confession Peak Cas 65. 1 Esp. Dig. 169. 4 Bac. Ab. 436.

If the escape was suffered by an understanding & confession that the escape has taken place is evid. against the High Sheriff - for the Sheriff represents the under Sheriff, as he is liable on his bond. & also shall be liable for all the liabilities of the under Sheriff - under Sheriff might be used in this case against the Sheriff - Le Ray 190. Peak 17. 18. By the latest authorities how ever this evid. of the under Sheriff is limited to his confessions or declarations made at the time of the escape, & is not extended to those made afterwards. 1 Campb. 389. 391 n. Peak Cas 65. 10 Johns 476. Phill 96.

In an action by the assignees of a bankrupt, a confession by the latter before he became bankrupt that he was indebted to the petitioning creditor is good evid. to support the commission - for as the evid. will be good to obtain the commission it shall be good to support it. Esp. Cas. 266 Peak, Rep. 65.

Upon the same principle, the Garnishee may upon a sci. fa. against him prove the declarations of his Garnishor, & suppose Creditor that he owes nothing; for such a declaration will be good evid. against him, it shall therefore be so against the creditor. Sheriff 246.

It also, when one justifies under the title of another, the admission of the latter as to his title may be given in evidence against the party to the suit, also in an action of trespass, for a certain wagon & goods, that he entered by the command of B. the owner, how here the admission of B. that he was not the owner, may be given in evidence against the defendant Christy v. Pratt.

It is a general rule that when there are several defendants in a suit, the admission of one of them is evidence against himself only, for one man cannot confess away the rights of another Stark. Ev. Pl. & Ev. 243. 1 Mr. Mal 46. & 69.

Hence in an action against one of two joint & several debtors, the confession of one is not admissable to prove the contract Christy 82. 194. 203.

There is an exception to this rule in case of Partners in trade, if one partner is sued alone for a company debt - & he does not abate the suit by plea of non-joinder of his Partner, the confession of the other tho not a party to the record, is evidence against him - This however presupposes the Partnership to be established the confession will not be proof of the partnership - the reason is that each Co. Partner is the agent of both & the act of either is the act of both - ergo the confession of either is the confession of both. Peak Evi. 16. 203. Christ. 82 209. Gilb. Ev. 57. Phill Ev. 2. 1 Cai. 568. 1 Dy. Evi. 169 n.

Altho this rule has been carried so far as to allow the confession of the partner tho' not sued himself, to be given in evidence against the other, the made after the

(Clancy) the dissolution of partnership Phila 73. 1 Jones
Rep contra 3 Johns 566. This case don't go
pretty far, for the relation is papers but the
case is on the ground that ground has the relation
continues.

The confession of one of two joint trespassers
as to the execution of the contract is not
evid. against the other; while the contr. being proved
the confession is good against the other, to take the case
out of the Statute of limitations, or for any similar purpose
for here the contr. being established, the co-partners
became co-partners quoad hoc. The confession is here
not admitted in Evid. as a civil fact
or new promise, & so taking it out of the Statute
for other purposes see a strong case Whitcomb & Whiting
Doug. 628. or 632. 2 Doug 309. Peak Rep 15. 103. Phill Pr. R.
6 Johns 103.

This rule does not hold in Crim. cases
or torts, indeed it is not in terms judicially settled
for here the actions & declarations of one is not the act or decl.
of the other, Nor is the confession of one out of Court that he
committed the crime in company with the other
to be allowed as evid. - for this would be to allow one to
charge another out of Court in his absence &c.

But it is true & to be allowed that in cases of illegal combinations, - the fact of combination being proved, the confessions of one of the party, as to the nature of and continuation of the illegal act, if made at the time of doing it is evid. not only against himself, but against the whole party. &c.

Ch. J. to Jury & House - In Ld. Stafford's case being a confession, there is a plan of pro. to establish the plan of one of the notes is the plan of all. The confession then shall be evidence against all - but this is contradicted at the time by another note, in wh case it will be evid. only against himself. 5 St Tr 527. Phill 93-94

If one of two defts in a trial suffers a default & the other pleads & issue the evid. of the former may be proved on the trial of the latter for the purpose of shewing the amount of damages. - as in a case of Treason &c. A. defaults & confesses. B. pleads &c. Now the jury cannot sever the damages, but must assess the amount of them in one verdict. A tho' A. is not nominally on trial, he is so in fact as to the quantum of damages. His confessions then may go to ascertain this quantum. 1 Day 334.

In crim. cases, the confession of the criminal out of Ct. or before a Magistrate or Ct of Enquiry is evid. against himself. 1 Hawk 606. 607. 1 Mod 42. 361. Phill 91, 92. Peak 14.

And it seems now to be well settled that the proof of defts confession tho' uncorroborated by any other evid. will warrant the jury in finding the deft guilty of a capital offence. But the time was when this rule did not obtain. 1 Mod 51. 273. Foster 242. 243. Leach C. Cas. 317.

But a confession not of Ct extorted by torture

Hearsay evidence of anything or induced by promises of favour or of pardon, is not allowed to be given in evidence agt him in any case; for to allow it would be to put the prisoner at the mercy of the artful & designing. 2. Hale P.C. 280. 2 Bawl 204, 211. 1 Mo Mal 142 & 144. — Leach 124. 126. 245. contra Keyl. 18. but overruled. —

And hence a confession made by a person out of Ct. in expectation of becoming witness for the Crown or Public is not allowed as evidence — for to admit it would be to expose the prisoner to extreme hazard Leach 686.

But on the other hand, the discovery of a material fact resulting out of the confession attained by fraud violence or flattery, is good evidence tho' the confession itself is no evidence at all, as if person arrested for theft is induced by fraud &c to confess his guilt, & he also tells where the stolen goods are & he found, if they are found there they are the fact is good evidence agt prisoner. — for here is no danger of suppression, neither is there of falsehood. 1 Mo. Mal 47. 8. Peak 20. Leach 6. & 299. 301.

There is a broad distinction between a confession of a party & an offer to compromise, the latter can never be given in evidence for a man may be very willing to pay a sum of money or to conciliate out, & avoid a suit in wh there is no danger of his being subjected, it is then no evidence of his guilt. & agt. Ld Mansfield says a man must be supposed to pay the peace; without prejudice, 1 Esp. Ca. 143. Phil & B. 208. B.N.P. 236. Phill & E. 9. Peak 18. 12.

But the contract of a minor [illegible] Com. Dig. Com. Prom. E. denying the treaty for a compromise is void agt the party making it. Peak 14 1 Esp. Cas 140. 2 id 475. 3 id 113. Peak Cas. 5. Phil. Ev. 236.

In some cases the act of the party amounts to an admission which is conclusive agt him, & cannot be actuated or contradicted, — Case. one acts as an Innkeeper. he cannot deny but that he is a lawfully constituted Innkeeper, for the law will not allow him to take benefit of that character & still avoid its liabilities. 3 DR 635 n. 637. Peak 20.

If a man lives with a woman as his wife, he is as much liable for her debts as if she was his lawful wife, for as he holds her out to the world as his wife, he shall incur the liabilities of her husband, 2 Esp. Cas. 637.

Agt. If in some case one person treats with another as holding such a situation or such property, & derives a benefit to himself thereby, he is not afterwards at liberty to deny, that the other does hold as he does. Thus if A. leases the glebe land of B a incumbent, & puts a crop from the land, A shall not now be permitted to dispute B's title to the land as incumbent. — And agt. of a mortgagor in poss'n based on an understanding it is not competent for the mortgagor under tenant to deny the ownership of Mortgagee by pass'g the title of another, — He shall not avoid this title for the purpose of avoiding his own liabilities. 5 DR 4. 3 id 632. 1 id 761 n. 2 M. Rep. 260. Lee v. Rankin 1 DR 761 n.

Kinds of Evidence.

All evid^{e} may be considered as direct and presumptive, i.e. all lawful evidence which is relevant, goes to prove the point in issue directly or presumptively

Direct evid^{e} is that wh goes directly to prove the point in issue

Presumptive evid^{e} as the word is used in the law of evid^{e} means a presumption from a fact admitted or proved, of some other fact or facts. it arises consequentially to prove the fact in issue by directly proving another. e.g. A is accused of theft, if B swears he saw A clandestinely take the article, - the evid^{e} is direct But if the evid^{e} consists in the proof of the fact, that the goods were found in A's possession, - the evid^{e} is presumptive & circumstantial & throws the onus probandi upon deft. This raises the presumption of guilt tho' A may be innocent notwithstanding. 1 Mass. R. 6. Swift's D. 186.

All presumptive evid^{e} is from its nature liable to be rebutted or disproved Peak's N. P. 16.

Long & undisputed possession raises the presumption that the possession was legally commenced. & even records may be presumed; this then goes directly to the existence of the fact which is to go to the jury; e.g. if the title can be traced from A to B & B. & D is in poss^{n} & has been in poss^{n} quiet & undisturbed for 20 years & the title cannot be traced, still the D will have

the jury to presume that D. title & good possession
by any commenced. La Mansfield says, it is
competent for the jury to presume a fact for
the quieting title of possession altho' they do
not believe that there was a legal commencem.
of the prop.ty. So in the case of Mayor of Hull
vs Horner, where the question was whether the
Borough of Kingston upon Hull had a right to col-
lect port duties, which right could not arise
except by matter of record - either by grant from
the king or by act of Parliament. La Mansfield
directed the jury to presume such record and
his decision was affirmed in B.R.
There have several questions of the like kind been
lately decided in this State. In this County the
Jury were directed to presume not only that
there was a deed of conveyance but also that it was
recorded, & that the deed & record were both lost.
In the County of Washington, Case of Buck vs Bailey
they were directed to presume the whole course
of Probate proceedings in the settlement of an
estate. - Admiralty case Churchill vs Warner
was decided in Middlesex County. - The principle
governing how I repeat it, is, the quieting title
of possession 12 Mod 505. Doug 103. 219. 216. 1 Bac Ab 99. Cas.
Ab 686. 3 Mass R. 549. Peak 242.
In another case in Eng.d the direction to the jury
was, that they had a right to presume a common
recovery in case of its being necessary to create a legal
commencem.t of the prop.ty Salk 589. 2 Bac 159. 2 Burr 1065

Upon the same Principle: when one of two joint tenants or tenants in comn has been in quiet Possn for a length of time (36 years was the case) the Ct will direct the jury to presume an ouster by the one in Possession, & this is in the Ct of Directions Case 419.

You perceive then that not only comn appearances, but mere lapse of time has been held that title, adverse to & subversive of the true owner. & indeed the rule is that whatever is necessy for the consummation of the title may be presumed, & quiet long Possn, & it seems that quiet Possn for 20 years in Eng & 15 in this State raise the presumption of title. At least it has been holden alibi, that when A had been in Possession of house for 20 years, wh had lights on the side on wh was the land of B. that B had not obstructed those lights — on the presumption that B had agreed not to obstruct them, & indeed all the privileges of an ancient right was given them Esp. D686.

So when a Lord has lain dormant for 20 yrs without suing but in case, or Payt of part of the Principal or interest, the Ct will direct the obligee to presume Paymt unless the obligee can shew good reason for the delay, as that he has been out of the realm, or in Prison, or that obligor has been insolvent during that period & is now able to pay. — This is on a similar principle as the above cases, viz to discourage stale demands, as a time after all evid is lost

alg

probably last is discharged, — The rule on this subject is now stronger than it formerly was as it is now said to vary the presumption of title is raised from a quiet enjoyt of 18 or 21 years. Bl. R. 532. 3. Ph. 355. 7. 8 Mod 298. Bur. 434. 1963. 1 D.P. 298. Bak. Evid. 24. 25.

If a bond is not barred by the St of Limitations, & has laid 18 or 20 years, the rule is that the jury will presume payments until the contra be proved &c. it throws the onus probi upon the debtor Stra 826. La Ray 990.

An indorsement on a bond made by the creditor if made before the time had elapsed which raises the presumption of paymt is good evidce of the fact of paymt of so much & rebuts the presumption that the whole is paid A ex. gives a bond to B. — it is of 25 years standing dept avails himself of the presumption of paymt now if debtor will shew an indorsement before the 18 or 20 years had elapsed — it will rebut the presumption — But if the indorsement is after the 20 years has elapsed, it is no evidce for it might have been made by the creditor to rebut the presumption of paymt Stra 826

If a creditor writes to a debtor payable by instalments, receiving paymt of the last instalment, it raises the presumptn that the whole is paid. — The same thing holds as to rent — the presumn may be rebutted 1 Wils 281. Comyns 183. 1 Str 395. Bak Ab.

Presumpt.ns Evid.ce } But with respect to all these presumptions, The mere length of time short of that provided by the St. of Limitation is not sufft. ground for presuming the extinction of any right in those cases over which the St. extends. So in the case of quiet possession of Lands, in Eng for 19 years & eleven months, it does not raise the presumption of good title

In Conn. the suit on a bond must be brot. within 19 years, or should an action be brot. at any time however short before the 19 years had elapsed, the recovery would not be barred by the presumption. But under the St. once elapsed it is an absolute bar. I have nothing to the point to decide whether it has been pleaded or not. Rose p. 214. Peak. Evid.ce 24.

Desunt

Written Evidence

Evidence is divided into written & parol evid.ce. Written Evid.ce is divided again into three kinds 1st Records 2d Public writings or documents wh are not records, 3d Private writings Peak Evidence 26.

A Record is a written memorial of the laws of the state and of the precedents of justice made & the laws & customs of the State & the acts of the Legislature, & the judg.ts & judicial proceed.gs of the Cts of justice Fitch. C. 7. 45. Peak 52. 19. 20. Pulteh. 2. 205. 221.

A Record can never be contradicted in the language of La Roche it imports absolute & uncontrolable

verity, This does not mean that nothing wh is intro=
duced in the form of a rec? can be contradicted
but it refers merely to legitimate records. It is the
highest species of evid? & is so in consequence of
the high solemnity with which it is made B.N.P.
224. Peak. 27.

If however a rec? is made erroneous by
an unauthorized alteration, the fact may be proved by
parol evid? for this is a forgery
But evid? is never admissable to shew that an alter=
ation, made by proper authority, was improperly
made, as the rec? was corrected by order of the Ct.
1 Bl. R 664. 4 Burr 2525. 1 Stra 210. —
And doubtless evid? may be introduced to prove that
a writing importing to be a rec? is in fact a mere
forgery. — for this is not denying a rec? but any?
that instrument produced to be a rec?

But notwith=
standing the gen? rule, the fictitious date of
writ issued in the vacation may be contradicted
& the real date proved when it is nec? for the
purposes of justice; as in case of defts plead? the st.
of limitation, for as the writ bears date one day
of a? term previous, if the real date was not allowed
to be proved the deft wd suffer, as the Ct may have
run or the tender have been made to all appearance
after the commencement of the suit. 2 Burr 950.
3 Wil 1241. Peak 27. 20n
All fictions of law may be contradicted, for the
purposes of justice. —

Records.} As all acts are the memorials of the precedents of law, & as every one has a right to refer to those, it follows that they cannot be removed from place to place for private purposes, & hence it is that their existence & contents are provable by copies, as this is the best secondary evidence possible to be obtained. Gilb. C. R. R. M. P. 225-6.

And on this subject it is a general rule that whenever any writing of a public nature will of itself be evidence if introduced, a copy of it duly proved is also evidence. 2 Salk 154. Lacy 572. 1 Mod 355. Stark 96.

But on the other hand a copy of a copy is no evidence for as the first copy was not produced in the second, the second copy cannot in the nature of things be a higher evidence & the first is no evidence without being sworn to & cannot. 2 Ray 154. 1 Mod 356. 2 Salk 154.

The Public acts of the Legislature require no proof of any kind for being the law of the land are supposed to be known by every body & particularly by the Ct. & the Ct are bound to take notice of them ex officio. It is true the St Book is often referred to, but it is not as evidence but merely to aid & refresh the memory of the judges & counsel; — acts of a foreign State a different question arises, vid. post. Gilb. C. R. Bul. N. P. 222-5. Stark 86-7 n.

But Private acts, not being a part of the law of the land are not supposed to be known, even to the Ct. They therefore must be proved

proved by copies like other acts relating to private rights, as an Act of the Legislature allowing an Infant to sell his land, — It must be proved, as much as a deed or record. — Dyer 299. Fitz. 12. 13. Dyer 299. 10. Mod. 126. B.N.P. 222.

And tho' a private Act may be printed in the public Statute book, still it will be no evidence for the book itself is no evidence for it is but a private unauthenticated copy of the Act, not verified on oath or any official declaration — it is but the work of the Printer, Bul. N.P. 225. Peake 29. 2 Str. 881. contra 2d Roy 1492. but dictum must not be law,

If however the Legislature declare a Act not in its nature private, shall be considered as public, no evidence will be necessary for the Act will be bound to notice it ex officio, also it is evidence in itself. Peake 29 or 20 n.

Records & Journals are to be proved by Copies; The copies of a record of the Legislature are to be certified by the Secretary of State e.g. a private Act when the question is whether there is such a Act

The copies of the records of Courts of justice are to be certified by their proper officers. In our practice the Clerk or as he is called in some of the States the Prothonotary, if there is one, If not by the Judge himself, as in Com. the records of a Single Justice,

This also is to be certified by the seal of the Court if it has one, In Com. all Courts have a seal except that of a Single Magistrate

Records). By a Act of the U.S. all the Cts are authorized to know the Acts of the Legislatures & Cts of all the States in the Union. The Judges are to get their information where they can but it is not a point in to be proved by Acts U.S. 1789. Swift Ev. 7. Lunds cases, Gilb. Ev. 19. 1 Ld Raym 146. 7. Peak 20. 1.

Copies of records under the proper seal are called Exemplifications, and it is a rule of the Cts, that the seal of public courts is full evidence in & of itself, without oath or other authentication, for some evidence is necessary to authenticate them, & without the seal or something similar, witnesses would have to be introduced; which ought not to be done as the duties of Cts of Justice are to be certified only by themselves. 1 Mod 125-6. Gilb. Ev. 19. Rowles 411a, Mod. 115-7. 1 Ld Raym 146.

As to the manner of certifying the record of one a Ct of one state of the Union, for a Ct in another State, by Act of the U.S. it is provided that it must be certified by the Clerk of the Ct & the seal of it must also be accompanied with a certificate of the Ch Justice Governour, Sec. of State or Chancellor that the attestation by the Clerk is in due form & by the proper officer — this is because the Clerk is not supposed to be known in the other States, by Acts U.S. 1789.

By the same Law copies of records of office books (as they are called) kept in a public office not appertaining to any Ct of justice — as town or County registers — must be certified by the keeper of the office & with the seal of the office if

Records } if there is no Statute provided with a certificate as copies in Ct.

Copies of records of a Ct of Justice are of four kinds 1st Exemplifications under the great seal which in Eng? is kept by the Chancellor 2? Exemplifications under the seal of the Ct to which the record belongs. this is the practice of the U. S. generally. 3? Office copies i.e. copies certified by the attestation of an officer appointed for that purpose, but not under seal 4th Sworn Copies, these are copies compared with the original, & the truth of which oath is made in Ct. Gilb. E. 114. 2. Peak 126-9 Bul. N. P. 226.

Copies under the great seal are not considered as records & not as copies, in consequence of their great solemnity, these are the only admissable evidence on the issue of nul tiel record, when the issue is joined on a Ct equal or inferior to that to which the record belongs, if the Ct is superior it will consider the record & the law & not us. — But it is not so in this country. 144

Other copies answer diff? purposes. but none of them are admissable in evid? to the issue of nul tiel record Cloud 411a, Gilb. E. 114. Ward 115. Peak 126. 9.

Exemplification? 2?

of the records of the Cts under the great seal being unknown here, they are exemplified under the seal of the Ct. that being the highest evid? & being of higher evid? than upon any other copies, in general other are excluded. Lutw. 1562, Bull N. P. 225, Peak 129. 30. —

Records } The last cases relate to cases in which the issue is joined in another Court than that in which the issue would belong, for if the issue is in the same Ct. the Ct will order the original to be produced, as it is in their own Hands. Peak 29.

I observe here by the bye for it is a rule of Law that the issue of nul tiel record always concludes to the Ct. for it is a question of law whether the record exists or not, of which the jury are not competent judges, Laws Pl. 268.

But where the record is merely matter of inducement to an act. or defence, nul tiel record cannot be pleaded, for matter of inducement is not issuable B.N.P. 230. Gilb. C. 26. — 1, Sid, 145, 6. Laws Pl. 46.

In those cases as the issue is tried by the jury, the record is submitted to them, & here a sworn as well as an exemplified copy is admissable, Bul. N.P. 230. 2 East 473.

To illustrate this distinction. — If debt on judgment is brot. & deft. intends to deny the cause of act. he must plead nul tiel record, & here as the rec. is directly in issue, none but an exemplified copy will be admitted in evid. But if the act. is Ejectment, & Plff claims under a judg. & execution, as the record is but matter of inducement — as evid. of the title, it is to be submitted to the jury as part of the evid. how the right of the action is to the ouster. A sworn copy of the record as office copy is good evid. of the title, But a copy of a sworn copy is never evid. Lawes well it may be authenticated Peak 29.

Office Copies are grantable only by an officer appointed by law for that purpose, & a copy thus granted is of itself evidence in those cases in it is admissable ie. it is admissable without any collateral proof as the oath of the officer Gilb Ev 23. 2 Lowd 110. But. N.P. 229. Peak 91. 93. Case of a copy attested by the town or county register of a record in his office

But a copy
~~certified~~
by an officer not appointed by law carries no credit from the certificate of the officer, tho' being common hand it may be good evidence as a sworn copy. Gilb Ev 23. 4. 26. But. N.P. 229.

But tho' a copy is generally provable only by a copy of some kind, still if it can be clearly proved that a record once in existence is lost or destroyed inferior evidence of the contents of it is admissable for now this is the best evidence that can be obtained Gilb Ev 22. 1 Vent 295. 1 Mod 114. Salk 285. But. N.P. 228.

could in such case a copy if there is one tho' it is not examplified or sworn to is admissable Evidence By this doctrine is meant not that any kind of writing may be admitted as an evidence but a writing which imports to be a copy, & is authorized by testimony which proves it to be substantially the same.—

But this species of evidence is in general admitted in those cases only, in which antient records or those of long standing are lost or destroyed, for if a recent record is lost the Court will order a new one to be made out

out

Records ~ cert. of this matter the evid. conclusive, upon the same evid. wh will enable the jury to find a record ~ Cast, will enable the Ct to make a new one, i.e. proof of the contents of it. Bur ~ 22. 1 Mod 114. Gilb 42-3 Peak 80. 23m.

In gen. an exemplified copy of a record to be admitted as evid. must be of the whole rec. & not of any part exclusively, for a detached part of the rec. or any instrument may bear a very diff. import from that it had bear when taken with the rest ~ Cast 173. Bull. N.P. 227. 8 Gilb 14. 23.

For and against whom may a Record of a Civil Suit be Evid.

In gen. a verdict or judg. in civil suit is evid. for or against the parties to the suit alone & their Privies as a rec. between A & B, may be given in evid. between the same parties in a subsequ. act. for the same cause or between A & C. or B & C. Ray 731. Salk. 276. 290. Peak 225 ~ 8 Mod 112. 1 Mod 6 Vin. Peak 89. 54

Privies are 1. Privies in blood, such as privity in law between ancestor & heir at law ~ so that a rec. between A & B. cannot a Stranger may be given in evid. for an act. between the heir of A. & B. for the same cause 1 Cast 352. 8 East 351.

2d Privity of Estate, as between Lessor & Lessee, Upon & after, joint tenants & Coparceners, different remainder men by the same deed, Particular tenant & remainder man 1 Cast 169a, 352. Bull. N.P. 232. Gilb. 61. 1 Ch. 272. 2d ed. 22. Peak 89. 90.

3d Privity in Law as between Executors, Administrators &

& with a tenant in dower. with a husband as tenant by the courtesy 1 Inst 358. 2 East 553.

Privity of Representation, as between Testator & Exec^r Intestate & Admin^r, Ven as the wid^w & conusee agt the joint^s were alive &c it is also admissable agt the privies 4 Co. 123 a. 4 Term as many other divisions of Privity made in the books but these are the only legitimate ones.

As to the Effect of &c. agt the Thing. It is an established rule that a judg^t rendered by a Ct of competent jurisdiction directly on the point in question, is conclusive for or agt the parties & their privies, as if A sues a judg^t agt B in debt on bond & he appears, the rec^d may be given in evidence agt A in a subsequent action agt B for the same cause, or agt the privies of A. if he brings an act^n agt B on the bond. — The record alledged as an estoppel, 5 Co 33. 2 Salk. 519. Cro E. 555. 2 Vent 169. 1 Lev 236. Comber 351. Salk 84 456.

Hence if final judg^t has been given in a suit it can be called in question or impeached only by due course of law, as by writ of error, appeal &c in Equity — only bringing relief, or An Comm^t &c, application for a new trial, for tho a new trial may be granted after final judg^t, yet it differs from the C.L. — a final judg^t on the merits in no collateral way i.e. by original action. Salk 86. 1 Sid.

1 Day 170. The reason of this latter rule is obvious & final judgement as to a legal right must determine the controversy, or litigation would be endless.

The rule is the same as to decrees of Equity & awards of arbitrators, - they cannot be set aside & reckd by due course of law - 1 Day 130. 3 ib 30. Rich 68. 75.

If their judgment has been undone for defect or demurrer, Qua to the action or otherwise when the right in question is avoided, the Pltff cannot while the judgt continues, maintain the same or any consonant action for the same cause. Consonant actions are those which may be brot for the same cause of action, & to sustain which the same evidence must be adduced, etc Trespass & trover, and in case of a forcible taking of a chattel, & a sale of it, trespass trover, & a punishit are consonants: as trespass for the forcible taking, or wrong of the plt. trover may be sustained, or after the sale Pltff may bring case as his agent & sustain a punishit for money had & rec'd to Pltffs use, so by the rule a recovy in any one of these forms of action will bar Pltff in action of the other kind, as in the same 9 Mod 304. 240. 2 Str. 882. 9 East 346. 352. 2. 6 D. 6 Mod 26.

But the rule does not hold where the first action was mis conceived, or failed for want of some precise allegation, wh is made in the 2d action, for in such case the right in question a ground of claim was stated in the 1st action as a 1st

dift. therefore the Plff. may recover that the cause of act". alledged in the second suit is the same as that of the first, as trespass was not the proper act". he then Cov.t Hoover. Or he Lot Hoover first but did not allledge conversion, he of course failed but this does not prevent the second act". of Hoover, alledg.g the conversion. 2 Vent 159. 1 Dac 116.7. Cro E. 667. 668. Ray 476. 2 Mod 318. 3 id 1.12.

On the other hand a judg.t for Plff. on a claim of a debt or other demand is conclusive as to its existence as ag.t deft & his privies. & the rule holds whether the recovery is upon verdict, demurrer, confession or default 7 JR 269. Bul. N.P 232. 1 Dag. 170. Peak 344.5.

Hence deft. in such case cannot recover back the money paid under the judg.t even tho' he has conclusive evid.e of a previous payment or that it was never due, and this is not all, he cannot in such case ~~recover~~ back maintain an act". ag.t the Plff for fraud in obtaining the judg.t - for this would be allowing him to impeach a judg.t collaterally i.e. by original action 1 Dag 130. 3 Dag 30. Peak 33. 68. 95. 2 Mod 414. 7 JR. 269.

The same rule holds as to the decrees of Chan.r & awards of arbitrators, these cannot be impeached collaterally Peak 68. 95. 1 Dag 130. 3 id 30. 2

The case of Moses & M.c Fadon is said to conflict with these rules, but I dont think it does.

Records } does the action that was to recover the money
paid upon a judgt recovered agt the plff in a Ct of
Conscience, Retain evidce on his part not being
Admissables the decision of the C.C. was on the
ground of the judgt being one of a Ct of Conscience. But
this case is now very much shaken

It has been decided
that if a party on being sued pays the money, and
denys it to be due, it cannot be recovered back, for
it is paid in a course of Legal proceedings, tho not
upon a judgt. 1 Esp Cas 94. 2 Vez. The rule was laid down
by Ld Kenyon, but I doubt its correctness, as not
being within the principle it goes upon the ground
that the party is estopped by his own act

If plff
is not allowed to recover the whole of his demand
but only a part he is precluded from recovering
the remainder in a subsequent action, for a
judgt for a part is conclusive evidce that no more
is due, it is substantially a judgt for defdt ~~pro tanto~~
as to the part not recovered.
But if the ~~defdt~~ plff did not attempt in the first
action to prove a part of his claim, a sec'd action
may be maintained for that part, for his claim
tho it was not sued for in the first action. The sum
sued for is not material. 6 Bac 6 Vez. Rep. 35. 36.

I observe that a final judgt as a part of suit is between the same
parties is a conclusive bar to a subsequent action for the same
cause, But there is a diversity to be noted between personal and

All personal actions are of equal degree i.e. rank. A of course a bar to one wide be conclusive as to any other by way of estoppel, i.e. for the same cause of action, as a bar to an act. of trespass will bar also the concurrent act. of trover. 5 Bos.

Real actions on the other hand are of various degrees, some being higher than others, and they are also of a higher degree than personal actions. Hence a judgt. in a personal act. is no bar to a real act. that for the same cause or relating to the same subject. Thus if A sues B. in trespass quare clausum fregit, & judgt. is rendered for def.(B.) it is no bar to a subsequent real act. by A. against B. because the freehold of the same close, Nor is a judgt. in one species of real act. a bar to another act. of a higher nature tho' relating to the same subject, for in both these cases the immediate cause of demand is not the same in both cases. As Ejectment is to recover the right of poss.n but the real act. is to recover the freehold. 3 Cost. 358.9.

But in every species of action, a final judgt. as it respects the immediate subject matter in issue, is a conclusive bar to any subsequent act. for the same cause 3 East. 355.

Hence if any precise fact, as pt. did seised in fee, is directly put in issue, & judgt. is rendered on it even in a personal action, it is always afterwards conclusive evidence as to that fact, so as to prevent that fact being ever afterwards litigated in any species of action whatever even in a real action between the same parties, 3 East 346. 351-5-8. 366.

1 Records 5 To make a record of a former suit conclusive as to any matter of claim or right it must appear from the rec.d that the same claim or right, the same subject matter was in issue in the former action. As if A. sued B in Dover for a horse & judgt was rendered for B. A then sues again for the same horse. It is material that it be for the same horse, the former judgm.t is here conclusive for it appears that the same point or right was there in issue.

Here it is to be observed that it is always admissable to allow by extrinsic proof that the cause of act.n is the same or diff.t in both actions, indeed it must be so proved.

This also is to be noted, That whether a given point or subject was in issue in the former act.n must appear from the former rec.d itself, but whether the subject matter in dispute in the former act.n was the same, must in the nature of things be proved aliunde, As if A. sued B in the first act.n for a watch, and he sues him in the rec.d act.n for a watch, how the rec.d tells whether a watch was claimed in the first act.n, but whether it is the same watch that is claimed in the rec.d act.n must be proved aliunde.

Adverted, that to make a rec.d conclusive, it must appear that the same claim, or subject came directly in issue in the former suit, thus in an act.n for performg work and labour, a rec.d of a former act.n in wh the present deft had recovered of the pltff. under the gen.l issue, the compensation for that work, is not conclusive in the

the present act^n, for it does not appear from the rec^d that the unskilfulness of the work was set up as a defence, i.e. was put in issue. — Case of repairs a water, 1 Esp. 43. 2 Johns 24.

And a prior judg^t between the same parties is conclusive as well when the subject arose incidentally as when it formed the ground of the subsequent action, as in an act^n on a Policy of insurance, with warranty of neutrality, on the question as to the ship being neutral, all the evidence existing, the sentence of the Ct of admiralty condemning the ship as enemies property is conclusive with^n Bul. N. P. 244. 8 Mod 196. 4 Bl. 2 East 258. 493. 7 Mod 529. Doug. 554. Again, if in a real action brought by the heir at law, a question as to his legitimacy arises, the former sentence of the Eccl. Ct as to the marriage of his parents would be conclusive as to the marriage Bul N. P. 244.

But on the other hand a prior judg^t between the same parties is no evid^ce of a matter of fact which arose incidentally in the former act^n — It is to be said must have been directly in issue Hob 53. Bul. N. P. 233. 244. As in an act^n between A & B. A produced a witness who by the rec^d of attaint was proved to be guilty in famous. A. B. recovered, A. then brings another act^n ag^t B. & adduces the same witness, the record of the prior action would be of no avail whatever as to the fact of witness being infamous, for it does not appear upon the record. the question arose incidentally

(Recap 8.) it was not directly in issue

nor a judgt

by. Pl. on a point only incidentally cognisable by it is no evid. in a subsequent act. between the same parties as a question of collateral arising in a Ct of Eq., as in an act. on a policy of insurance with a warranty of neutrality, a judgt by Ct of C.L. that she was not neutral, is no evid. in subsq act. &c.
If however the fact of neutrality was directly pleaded & the issue found, by another rule it wd be evid. Peak 76.

Matter merely inferable from a record by argument is no evid. Thus if A sues B. on a contract, & B under the gen. issue defends on the ground of infancy, A. cannot shew that he recovered of B on another contract, & thereby infer that B was 21 on his contract, notwithstanding his infancy, for the former record is no evid. of such a conclusion

And a prior judgt given on the gen. issue is no case conclusive agt the parties in a subsq suit unless the cause of act. is the same in both cases and the title out of wh the cause of act. arises is the same in both cases. Thus A sues B. for a given nuisance, here if A has actually recovered of B. & he sues him agn for the continuance of the nuisance the former judgt cannot be given in evid., for any continuance of a nuisance is a repetition, & the cause of act. is not the same tho' it arises out of the same matter
Peak 97. 8. Prec. N.P. 204. 3 Esp. 265.

The same rule holds in the English actions of Ejectment
tried in this county whenever that form of the
action prevails — for a new casual Ejector as well
as a new Lessee & Counter may appear in every new
action. The judgt of the former action is no evidence in
the such action for as the fictitious parties may be
changed the identity of the action does not appear
Cunnington Ejectt 12. Peak 37. 38. On Contra. the prior
and subsequent actions for here there are no fictitious parties.

But in these three latter & all similar cases the
verdict is evidence in subsequent actions, but it is not
conclusive Bull N. P. 232, Gilb. C. P. 29. 30. 32. 35. Stra 505.
1151. Cart 79. 181.

If however the title or any fact decisive of the right has been put directly in issue in
the former action the verdict may be pleaded by way
of estoppel, 2 Coke 246. 254. 5. 258. 266.

You perceive then
by a comparison of the latter rules, that a verdict
may be in some cases evidence in a subsequent action
when the judgt itself will be no evidence at all and
hence arises a material difference to be observed between

the Nature, Effect & Effects of Judgments & Verdicts.
A prior judgt as to a title or point afterwards
in question is a sentence of the law deciding the
right, A Verdict is mere evidence of the matter
of fact. tho' when it is pleadable & pleaded by way
of estoppel it is conclusive

Records 5 The Office of the Verdict when it is to answer some matter of fact, whether pleaded or given in evid. un-der the gen. issue, The Office of a Judg. is not to ascertain facts, but to shew the right as determined upon the verdict or otherwise. — This diversity between the office of a verdict & a judg. hath been in almost all cases. Peak 27. 3 East 356 to 366. As A sues B in trover for a watch, judg. is rendered for defft. (B). A brings a subsequent act. ag. A for the same watch, now by the rule the prior judg. is conclusive of the right of B. On the other hand, if in an act. of trover C. the defft pleads a specific fact as J.S. did seised in fee & conveyed to him, & this fact is put directly in issue & is found, it is conclusive as to this fact in any subsequent act., but what rights follow as a consequence of this fact is left for the decision of the Ct.

But the prior judg. when it can be given in evid. at all is conclusive as to the rights & therefore cannot afterwards be litigated between the parties, Cowper 356. 7 T.R. 1 Lev 235. 1 Day 130. 170. Peak 34. 35. 37.

And a prior judg. except in a few exempt cases can never be made use of in any way except the cause of act. is in both suits the same, for if it has any effect it must be conclusive, & effect it will have when the cause of act. is the same & only then.

But a Verdict tho' conclusive when pleaded by way of estoppel, may often be given in evid. when not conclusive, tho' this cannot be done except when the fact was directly in issue Bl. R. 232. 3 Peak 365. Gilb. 29 to 35. Peak 37.

The cases in which a verdict may be given in evidence when it is not conclusive are those in which the cause of action or subject in dem and is not the same in both suits, tho' defending upon the same title or state of facts, As if two pieces of land are holden by one & the same title or deed As a claims two pieces of land under deed from J.S. he brings ejectment agt. J. S. his at Law. for one piece & recovers. In an action after for the other piece the former verdict may be given in evidence the it is not conclusive; for the causes of action are diff. tho' the title out of wh. they arise is the same, Gilb 249. Bull. N.P. 232. Stra 908. 1157. Carth 79. 181. 2 Mod 172. 5 Mod 356.

A prior verdict in a suit for a nuisance or disturbance may be given in evid. as a subsequent act. for a continuance of the same nuisance or repetition of the same disturbance - but it is not conclusive evid. - Dr. Mutto. 3 East. 353. Peak Evid. 97. 98.

A prior verdict in ejectment for a given piece of land may be given in evid. in a subsequent act. for the same land, notwithstanding the change of the fictitious parties, & the case & costs, but it is not conclusive in the subsequent actions, because the former action cannot be identified — but there the D. take notice of the real parties for the purpose of letting in the evid. Gilb 35. Bull N.P 234. Peak 40. 28.

In Ejectt. Evid. 13. a rule

Record is laid down as a rule that you may be lead into error. 2d ly. That a verdict cannot be given in evid. upon the facts as found in a special verdict but is certainly not law. The last exception of a verdict in ejectment is found ag.st the rule of Lucifer. That rule intended to throw verdicts alone, wh may be plead by way of est.pel; the verdict in ejectment cannot be plead by way of estoppel neither can the verdict in an act.n for a mesne be so plead in a sec.d act.n for the same mesne profits as a verd.t, Lucifer two confounded two things, the verdict as an estoppel, & as inconclusive evid. Lucif 118

For & against whom a record is evid.
In gen.l the record in a former civil suit is no evid. in a subsequent one as to the facts or rights it imports to establish, except as to the parties & their privies, The principle why third persons cannot be affected by it, is because they had no opportunity to cross-examine the witnesses, or appeal &c. Gilb 29.32.33. Pr. Ch. 212. La Ray, 1293, 3 Mod. 142, Bull. N.P 232.3.242.

Ag.st the benefit of the record ought to be mutual so the 3d person cannot take advantage of it ag.st a party, the party ought not to be allowed to take advantage of it ag.st the third person; In most cases there the objection is suff. That it is res inter alios acta Gilb 34.35. Bul. N.P 232 Hardw. 442. Phill Ev.

To the rule that no one can be given in evidence but such whose of the benefit may be mutual, admits of some exceptions, but these depend upon such a variety of circumstances, I must refer you to the books. viz. Peak 88. 9. 2 Ld. 9. Gilb 30 to 35. La Ray 731. Bul. Nis. 232.

Neither is the rule universal, that a verdict is no evidence except between the parties & their privies

Exceptions, 1st. Where a person sues another's name in a suit for his own benefit, the verdict will be evidence tho not conclusive for or against him using the others name, it is not conclusive because the parties on record are not the same so that there is no identity of action; eg. to an act. of ejectment ag.st the same nominal Defendant sues & in the name of J. Doe, A sues, & then brings a second act.n ag.st the same deft. but he sues by the name of Rich.d Roe & recovers a new Ejectment, now here the former judg.t cant be used as conclusive and e.g. for the act.n is not between the same parties, but the Ld has to do in the verdict as evidence the notice of the real parties. Bul. Nis 232. Gilb 35. - In this case the verdict is evidence on both sides - -

1st

cdg.t H. shot P. is not by cd. ag.t B. & D. jus tertii 2d. as servant of J.S. The verdict is evidence in a suit against act.n ag.st G. who is sued for the same trespass, at a diff.t time, & justifies as Sert. of J.S. for here J.S. is virtually the act. nominally the party in

Rec^d. for & ag^t. whom in both suits as is ascertained by the record. This however is not conclusive, the the verdict is a special one. Rak. 116. Lacy. 517.

3d. Ag^t. When the point in issue is a question of public right. On such case a verdict found & negativing a right in a given action will be evid^e. for or ag^t. the right in a subsequent act^n. between other parties, ob & living titles ag^t. B who defends on the ground of a public right of way, & the verdict is found ag^t. him & afterwards brings a subsequent action ag^t. B. who justifies by the same right of way. & may give the former verdict in evid^e. ag^t. him. and on the other hand had the former verdict been in favour of B. & might in the subs^t. act^n. have availed it in evid^e. ag^t. A.

So when the right depends upon a public custom & that custom is found by the jury, in a subsequent act^n. between other parties the former verd^t. may be given in evid^e. but it is never conclusive save of an act^n. by a City to recover tolls, — claimed by custom or prescriptive right. Rak. R 156. 219. Carth 161. 1 Carth 355. The ground of this exception probably is, that as the right is a public one any individual is in a degree interested & thus virtually a party to it as to the benefit or prejudice it may annex to him from it.

The judgt. of Ct. where proceed^s. 1st. are in Rem as of Ct of Admiralty, are generally con-

conclusive with respect to all persons whatever, whether mere-
ly parties to the act[n] or not. Park 794. 574 n.

Judgments in rem are those wh act directly upon
the thing in question: as a ship libelled, the law
takes immediate possession & if condemned gives
her to the public, here the action is not agt any one
in particular as the agent or owner. but public notice
is given, requiring all persons who have any defence to
make to come & defend, so that all the world are
potentially parties to the suit, & the sent is conclu-
sive agt all the world. So if after condemnation
a person should come from another country, & set
up his claim to the ship, he will be estopped by
the former record. - This record is not res inter alios
acta. 5 T.R 196. 434. 7 it 528. 681. 5 ib 255. 2 East 260. 2
W.R 997. 1174.

When therefore matter directly decided
by such Ct comes incidentally in question in a
Ct of C. L. the sentence of the Ct of Admlty is con-
clusive, as in an act[n] at R L on a policy of Insur[ce]
with a warranty of neutrality. The sentence of the
Ct of Admiralty condemning the ship as enemies
prop[y] will be conclusive in the act[n] at R L as to
her neutrality. But if the question of neutrality
has not been before decided in the Ct of Admiralty
tho it is there open to be decided collaterally at C.L.
ib. ante.

The rule is the same as to the existence of
a Ct of exclusive jurisdiction, granting probate of
a will, & for the same reason, that all the world

may

Records. For ag^st whom? may become parties to the proceedings. Thus when one was indicted for forging a will, he produced the probate of a will in which he was named as Exec^r, & the Ct held the record was conclusive in his favour. 1 Lev 236. 3 Sk. 125. Peak 78 n. 1 Day 170. 2 id 312. Show 184. 703.

So also if ex. brings an act^n as executor bo. b. & deft pleads that he never was Exec^r bo. b. - the probate of the will in wh he is named as Ex^r will be conclusive ag^st b. 1 Lev 295. Now these sentences of the Ecc. Ct of probate are in rem. for the probate of Wills & the granting of letters of administration, are not made upon proceed^gs like actions in gen^l; but the single question alone is decided, whether the will is genuine, or the person is entitled to the admin^n & this is a question wh any one has a right to controvert it and it would be foolish for him so to do without good ground as he subjects himself to costs. - This then being the case the sentence is conclusive ag^st all the world.

There are some cases in Leach & Cas. & in M^r Bacon's Cod^l wh seem to conflict with the case of indictm^t for forg^g the Will above. - It is there said the Ct wd not admit the evid^ce of probate of the will as evid^ce. But in the spirit of these cases the probate of the will was void, the testator at the time being alive, so that the proceed^gs in the Ct of probate were void as being coram non judice Leach & Cas 103. 2 Am^n Chal 422. 3 Sk 125.

There is another case wh might also seem to impeach the rule. But there, there was fraud in proceed & practised upon the Ct. wh is enough to vacate any judgt or proceed. Lower sections 2 Hn & Hal 430. That this was the ground of the decision see 2 Hn & Haly 493. 450. 461.

In general, also the sentence of the Eccl. Cts as to Matrimonial causes, is conclusive agt all parties, (as Divd. a marriage or divorce) in a subsequent question arising incidentally, as in ejectment by A as heir to B &c. On the question of the legitimacy arising, the sentence of the Eccl. Cts as to the marriage of the supposed parents of A is conclusive as to that fact. Ambler 756. 758. 3 Co 29. 7 Co 44 Carth 225. Show 95. Peak 78 m. 52 m.

Agt in an act. for Crim. Con. with Defts Wife, the sentence of the Eccl. Cts annulling the marriage is conclusive agt the Plff. Show 96. Peak 52 78 m. Amb. 756. 763.

So also if an act. is brot agt a man to recover a debt due from a woman as his wife, when sole, a prior sentence of the Eccls Ct. annulling the marriage as void, is conclusive in favour of defts. — For it shews that deft is not husd of the supposed wife. & as the debt was contracted while she was sole, the act. cannot be sustained on the ground of defts holding her out to the world as his wife 11 State. Trials 235. Peak 78 m. 54 m.

Now in all these cases the record is conclusive with agt a party, who was not a party to the record. The

Record in rem; the reason of the rule as agt third Parties probably is, That as the proceedings are in the nature of proceedings in rem, it ought to conclude all persons that they never were nor could be parties to the record If it is asked why is this in the nature of a proceeding in rem. I answer, That the proceeding in rem is as it concerns the matter, precisely in the nature of a common assurance; As common assurance is always conclusive evidence as to the title of Land agt every Body.

Such a sentence however is not conclusive upon an indictment for bigamy; Thus if A is indicted for having married B, while he had another Wife living; the judges sentence of the Ecclesiastical, annuling the former marriage or as a more proper example, confirming the second marriage will not avail him as a defence, The reason assigned here, is that the fact of marriage considered as a crime is not cognizable in the Eccl. Cts, 11. State Trials 261. Peak 76. 51.
It seems to me somewhat difficult to reconcile this with the case of forging the will, (above) they run very near each other & seem to exist; There is however the distinction that in the latter case the man might have made himself a party to the former record, but not in the latter, - This however is rather too refined.

In these cases individuals who were strangers to the proceeding may shew that the sentence was obtained by fraud & collusion between the parties; as that husband & wife colluded to obtain the divorce, - for this is a fraud,

agst

agst the Ct. - wh will vitiate the most solemn proceed^{gs}. - fraud agst the party will not vitiate the proceed^{gs}. 1 Veg 246. Comiller 962. 11 State Trials 262.

When one person has been compelled by suit to pay money for another, (as a Surety) in an act^{n} for a reimbursment he may give in evid^{ce} the record of the former suit agst himself, but not for the purpose of shewing the facts of the case, as that D. owed the debt, that Pltff was his surety, & has paid the debt; but merely to shew that a judgt of this kind has been recovered agst him, & this proof, as to the facts, is indispensable, as he has no right of recovery agst deft unless he (Pltff) has thus suffered. but deft may deny all the other facts ruled in the former act^{n}. 5 th

So also when Pltff has been ruled & subjected by the official neglects or defaults of his Under Pltff, as an Escape in an act^{n} agst the D. Pltff for a reimbursment. he may shew the former record for the purpose of shewing that he has been subjected for such a cause & to such an amount. but not that deft was his deputy, & made an arrest, & suffered the escape &c. &c. these facts must be proved otherwise.

So agst a Master is subjected for an injury done by a third person by his Servt, In an act^{n} agst the Servt he may shew as above. Indeed the analogies are very numerous The case of an Indorer of a Bill of Exch who has been ruled, suit by the acceptor is another case. Peak 238. - - - -

Recovery in a former suit by whom. evid. 3

In an act. on a covent. of warranty in a deed, plff may give in evid. the record of a former suit by which he was evicted, not however for the purpose of shewing that the evictor had an higher title — this must be made out by other evid. — but to shew that he has been evicted for without eviction he cannot recover on the cov. of warranty. Fitts. 28. Yelv. 22. 1 Roll. 346.

If the warrantor was vouched in, in the prior suit, the record is conclusive evid. agt. him as to the whole case. This vouching in is done by serving a writ of voucher (as it is called) upon the warrantor, which calls him to come & defend the title, wh. by the writ he is informed is in question. In such case whether he appears or not the record is conclusive agt. him — see Cov. Broken.

In an act. upon the warranty of title to a chattle, as a horse — the plff may give in evid. the record of a prior suit, in wh. the value of the horse was recovered of him, to shew that he has lost the horse — for without proving that he proves no damage — But not to shew that the seller had no title, or that he who recovered of the plff had. 1 Johns. 517. Swift. C. 15.

So also a record of a former recovery & satisfaction obtained by the plff agt. a stranger, for the matter or thing demanded is evid. for the deft. to prove the fact that such prior recovery & satisfaction has been had, as, if an indorsee sh. sue his indorser after having recovered of the

Rec.d evid.e for d.t ag.t whom. B. the acceptor, the defft may plead in bar the former recovery & satisfaction, or give it in evid.e — as the case may be. —

So if A & B were bound jointly & severally in a bond, & the obligee sh.d sue A. alone & recover of him & then sue B. B might plead give in evid.e the record of the former suit ag.t A. & the satisfaction to shew that the plff has been paid

So also if a trespass has been committed by A & B. the verdict & judg.t ag.t A. is evid.e in favour of B. & in this case you will observe that it is sufficient to shew the record without proving the satisfaction that as in case of contract, there, it is no bar unless the satisfaction is proved — see. Gov.t Bretton. Exr. Cas. 93.

In those cases also in wh a party to a suit derives his title from a judg.t in a former suit between himself & a stranger as in case of ejectment — he may give the prior record in evid.e & shew also the exec.n by wh the land was set off to him Cro. Eliz. 814. Here ag.t the record is res inter alios acta — it is admissable only to shew that the party producing it has all the title that J.S. the grantor had — not that J.S. had any title, — it is in the nature of a deed or common assur.e & as such is evid.e —— Thus far as to verdicts in civil cases. —

Whether a verdict in a prior criminal case can be used in evid.e of the facts proved by it in a subsequent civil case, is a question not settled even at this day. —

An example will explain the whole subject, Thus A. commits a battery upon B. & is indicted & convicted. B. now sues him in a civil action for the injury & offers the record of the prosecution & conviction in evidence of A's guilt. — This question remains undecided as you may see 1 Bac Ab 41 & 46. 140. 145 n. 1 Phill Ev. 8. 4 Burr 2225. — 4 East 577 n. 581. 1 Camp. 9. 151. Jack 2 Bac 1 Sid 325. Fell 31. to 32. R.M.S. 265.

If doubts had not existed in the minds of several eminent lawyers, as to this point, I confess I could hardly consider it a question, it seems to me it is extremely clear that such evidence cannot be admitted. Why are a verdict & judgment in a criminal case to be evidence any more than a record of a civil case, the case comes precisely within the general rule, the record is altogether res inter alios acta & no man ever dreamed of admitting the record of a prior civil action for a tort, as evidence in a subsequent action for the same tort. — Nor of contracts. The exceptions to this rule are founded in sound common sense & when a record is allowed to be evidence between other parties, it goes only to prove the fact of a former recovery, & not to establish those facts which were found by the verdict & judgement. But in this case the record is offered not merely to shew that the defendant has been once convicted, but that he is actually guilty of the trespass charged, & I think that it cannot be admitted & the weight of authorities is decisive to this opinion.

But the record of a prior civil or criminal action is admissable to shew that such a suit has existed tho'

tho' between different parties, etc on an indictment for ~~perjury~~ perjury, the record of the case in wh the perjury is said to have been committed not only may but must be produced to shew that the matter in the declaration was tried, — but not to prove the facts found in the verdict & judg^t. 1 B. & P. 243. Park 48.

But a verdict in a former suit is in no case evidence of the facts found by it until final judg^t has been entered upon it. If therefore either party produces only the former part of the record without the judg^t it is not admissable the judg^t being indispensable to shew that the verdict stands good. It has not been set aside by motion in arrest, for a new trial or in some other way. Stra 161. 1 B. & P. 243. 2 Phill Ev 96.

"No evidence of the facts found by it" is an emphatical part of the rule; — for there is no necessity for a record of the judg^t if the only object for wh it is introduced is to shew that such a suit has been agitated — for the verdict is evid^e of that fact whether it remains or is multiplied To prove then that such an issue has been tried the Postea i.e. that part of the record which proceeds the judg^t alone is ~~insuff.~~ evid^e. 1 B. & P. 243. Park 50.

And a verdict upon an issue out of Ch^y with a decree of Ch^y in pursuance of it may be also evid^e of the facts found by it — but not with-

out

Records for & against [illegible] without the decree is produced because the decree of such a Ct. is substantially the same thing as a judgt of a Ct of Law. & the same reasoning will apply to both. Ch. R. 234. Whit. 192. Bak 50.

There are some rules of evidce wh it is necessary for us to attend to, wh are not to be found in the books of L. L. except to

The Manner of Proving Acts of one State in the Cts of Justice in another

Here I would observe that the acts & proceedings of Congress & the records of the U.S. Cts are proved in this State precisely as domestic acts are, of course the rules already laid down apply to them Swift E. 65.

So also under the Constitution of the U.S. according to the construction given it in the Conn. Cts, a judgt in one of State is of the same obligation in another as a domestic judgt. There have been decisions to this effect in Penn. both in the U.S. Dis. Cts, & in the State Cts. In N. York such judgts were formerly holden to be only prima facie evidence of what they import to establish. of course they were obliged to try the whole case over again in the event of its coming there. — The late decisions however agree with those of Conn. & Penn. Kent 260 U.S. acts &c. sec 1. Swift E. 65. 2 Dall 302. Contra. Mass. Rep. 401. 1 Pains. 160. 1 Johns. 425. 6 do 37. 12 Mass 196. 219. 261. late decision of 1819. 3 Johns 86. 1803.

ch 9 the mode of proving these records, shall be by the Statutes U. S. is, That an Exemplification to be under the Seal of attested by the Clerk of the Ct. of one State to be evid. in another State must be accompanied with a certificate of the chief or presid. Judge of that Ct. — the Governour, Secretary of State or Chancellor, that the attestation is in due form & by the proper officer — 1 will sup. &c. 1 Stat U. S. 1863

ch 6 the mode of proving Legislative acts of other States. By a Act of Congress it is enacted, that the printed Ld. Books of the several states transmitted or transmitted by the Legislatures or Executives of those states, to the Executive of this & deposited in him with the Secy. of State, may be exemplified by the Secy. of State, & then received as evid. There is I think a correspond. provision in most of the other states. — This was first recommended to our Governour by the Legislature, to propose an exchange of Ld. Books, to avoid the inconvenience of sending to the Authorities of the Union for certified copies of a whole Ct. — for a part will not answer. — —

Public Writings not Records.

I observed above that written evid. was divided into; Records. Public writings or documents not of record, & Private writings. Of Records we have been speaking. Those writings of wh we come now to speak are those pub. writings wh are not records but are preserved at a fixed place by public authority

F.

Pub. Writs. & for the public use. B. N. P. 234. Peak 51. Gilb. 249.

These public writings are of themselves evid. & regularly, in point of solemnity, are of the highest species of evid., records only excepted. Gilb. 49. Bull. 234.

They are in gen.l proved as records sometimes are. viz. by Copies examined & sworn to as true. B.N.P. 234-5. Gilb. 49. 56. 57. Comb. 390. 2 Burr. 1188. Peak 51. 53. 56.

As to the mode of proving the public documents of the neighbouring states, see preceding pages. - these rules relate to the documents of the same State in wh they are to be given in evid.

The writings of wh we are speaking are not records, because they are not memorials of the laws, or proceedings of justice awarded by the laws & usages of the State, - wh constitute records. B.N.P. 235, Gilb. 46.

Of this sort of public writings there are several kinds. 1st Journals of the Legislature, as contradistinguished from the acts of the Legisl.re - these journals are merely the history of the Legisl.re, not the Sts. - & tho' not records are writings of high authority, - they are to be proved by Copies examined & sworn to by a witness. Peak 53.

But a mere resolution passed by one of the houses of the Legisl.re as a foundation for subsequent proceedings is no evid.ce of the fact counted upon or resolved. as the House of Reps. resolve that a plot is existing & that a prosc.n be instituted. or that such a publication is a

a libel &c. this resolution is no evid^{ce} that there was a plot or that the publication was libelous 4 State. Ended 89. Bark. 63.

2^{dly} The memorials of the proceed^{gs} of Ch^{ry} of Ch^{ry} — tho' of a public nature, are not records — & their not being rec^{d} is a reason why a writ of error lies not from a Ct of Eq^{y} tho' an appeal to the House of Lords will lie, —
The only reason why they are not records, is that decrees of Ch of Eq^{y} are not precedents of justice secundum leges & consuetudines, but secundum equum et bonum. Gilb 45. Bark 50. B.N.P. 235. It was formerly supposed that Ch^{y} was not bound by any precedents, — not so now. —

But the bill in Ch^{y} is evid^{ce} only for the purpose of proving the fact that such bill was filed, or such other facts as may be proved by more hearsay or reputation, & is not evid^{ce} of the facts stated in it, — for they are but the allegat^{s} of counsel. Hence if one in a bill in Ch^{y} state the pedigree of a child, it is evid^{ce} of the fact — for this is provable by hearsay, — but nothing else is to be proved by it. 4 St. R. 413. 158. Bark 12. 54. — It was formerly supposed that a bill in Eq^{y} was evid^{ce} of the facts contained in it — but this is not law now. see the old rule cited. 220. B.N.P. 235.

But an answer to a bill in Ch^{y} is evid^{ce} agst the party making it, as to facts alledged in it, as well as of the fact that such answer has been made, for this is a confession by oath of the most solemn kind, being given in under his personal oath — this constitutes between the bill & answer as to their effect as evid^{ce} 2 Vern 141. 288. Gilb 50. B.N.P. 237.

Public Writt[s] The answer however is an evid[ce] nothing more than a confession, & of course is admissable only when a confession in a diff[t] form wd be admissable, Hence an answer in Ch[y] by a Guard[n] of an Infant is not evid[ce] ag[t] the Inf[t] in a subseq[t] suit, for a verbal confession by the Guard[n] wd not be evid[ce] ag[t] the Inf[t], for the Guard[n] shall not confess away the Inf[ts] rights, So of Executs &c. 2 Tenn 42. 3 Mood 256. Earth 79. Ch. R. 8. 1237. Peak 54. 3 Atkins 235.

An answer by one of two Co. Partners, in a suit in Ch[y] bro[t] ag[t] him by C. is evid[ce] ag[t] the other partner in a suit ag[t] him by B. — the reason of this I suppose is, that of partners each is agent for the whole of course the act of one is the act of the whole & the acknowledgement of one is the acknowl[t] of the whole — as was holden where an acknowled[t] of the debt by one of the partners was allowed to be proved & to prevail ag[t] the plea of the St of Limit[s] made by another partner. Peake, Ca. 15, 203. — Peak, C. 55. Whitcomb & Whiting Doug 529. Chit-B. 209. —

So a vol[y] affidavit by one person interested with another has been held to be evid[ce] ag[t] both — for it is by a party in interest, & by a party to the suit — but this affidavit is not a writing of a public nature, — it is extra judicial. — Gilb. 51. 55. 7. Peak 55.

But in regard to an answer in Ch[y] it is to be observed as a gen[l] rule, that a copy of the whole answer & not of an extract of it, alone will be admitted. This rule applies to all written evid[ce] whatever, As if A wishes to prove a fact by a deed, no matter how parole the deed is, in relation the fact may be, still the whole deed must be

be introduced & made 16. Peak 53. B.N.P. 227. 237. 2 Vent. 194. 288.

The party ag.t whom the answer is adduced in evid.e in the subsequent suit is concluded by the admissions it contains ag.t himself & on the other hand, he is entitled to the benefit of the averments it contains wh are evid.e for himself. — This is a reason for the rule that the whole instrument shall be produced & not merely a part. — & so ag.n if a conversation is proved the party ag.t whom it is proved may compell the proof of the whole of it, & he is entitled to the benefit of all the qualifications it contains. — But the jury is not bound to believe all — tho the party has a right to have it all given to them. 6 Anc. & Gilb 50. Peak 55. 7. —

There is however one instance in which a part of answer may be read in evid.e without the residue. viz. when the object is to show that a witness introduced in the subsequent suit is interested in the event. — if this was otherwise the attempt to exclude the witness, wd be to admit his testimony & if the witness is incompetent his evid.e ought not to be admitted in any form, & if he is competent he ought to be examined in Ch. 2 J. Anstr. 3. who introduces D as a witness, & shews D's answer in Ch.y to prove his incompetency. D cant insist on shewing the whole of D's answer. B.N.P. 238. Peak 55. Phillips 264.

An affidavit made by one of the parties & used in a prior suit is evid.e of a nature similar to that of an answer in Ch.y & is provable in the same way in

Public Writ[s] i.e. by copy. Peak 57. 58. As if in a suit between A & B. A has made affidavit my[t] it may be proved in a subsequent suit by copy, as an answer. — But a vol[t] affidavit made by one of the parties is not thus provable.

A Voluntary Affidavit, is one made extrajudicially, as, sh[d] the Vendor of a chattel swear that he has the title & that it was unincumbered — now this being a private writing & having nothing to do with a cause of justice, cannot be proved by copy. Gilb 51. 55-6. 10 Com 53. 413. 2a Roy 311. 784. 734. 893. 986.

Depositions used in a prior suit may be used between the same parties in a subseq[t] suit provided the deponent is dead or without the reach of proc[s]. — in gen[l] they are not admissable except upon this ground. — for otherwise they are not the best evid[ce]

An Affidavit is an oath in writing by a party to the suit. A deposition is an oath given by a witness. Gilb 62. 1. Peak 59. 9. Bamfield B. R. 348. Salk 278. 281. 286. 1 Atk 445. B. N. P. 236. 239. 1 Mo Mal. 14. 283. 285. 287.

It has been said indeed that a deposit[n] given in a prior suit, is admissable in a subsequent suit when the deponent being subpoened & attending falls sick by the way or is prevented from attending by accident. — But this is questionable & indeed seems not to be Law. — it wd be no reason for postponing the suit, till witness c[d] attend. 1 Mod 2 33. 4. B. N. P. 239. Stra 920. Gilb 60. Peak 57 n.

But the deposition of a witness like any other written or even parol declaration of his may be introduced to contradict his evid.ce even tho' he is alive & in Ct.— But then absence, it is not evid.ce in chief— it is not introduced as a deposition.— but merely to invalidate the evid.ce given in Ct— & has no more effect than a letter. Peak 56.9

Quere. Whether the deposition of a witness, who at the time of making it was disinterested, but who by the operation of law becomes interested & a party, can be read in evidence? E.g. If A. as surviving witness to a bond afterwards on the death of obligor or obligee as the case may be he becomes his Exr, the question is whether a deposition of A. before he becomes Exr. (or Administ.r) is admissable in evid.ce? see Peak 56.9 Stra 101. Bal. N.P. 286. Esp. D. 756. Salk 286. 2 Vern 699. 2 Veg 42. 2 Atk. 69. 1 P. Wms 288.9 — see decision post.

Depositions de bene esse (as they are called) are taken under the direction of a Ct of Eq.ty — to perpetuate the evid.ce of a wit.s — These are admissable evid.ce — They differ from other depositions in this that they are not taken to be used in any particular suit— but to preserve evid.ce in danger of being lost 1.st by the residence of the wit.s in a foreign country. 2.d By his departure for a foreign country. 3.d By his death, he taking under a dangerous infirmity.— These are taken under direction of a Ct of Eq.ty on a bill filed by him requiring the evid.ce ag.st him refusing his consent to have the deposition taken. When taken they are admissable between

the

Prot. Wits. Depositions the parties, but in the two last cases they are admissable only in case of the happening of the contingency of the departure or death of the deponent, & in the first case if the deponent has returned to the country the deposition cannot be read. - 3 B. & P. 240. Norden. 315. 3 Bl. 333. Salk 691. Winder Ch. 22. Phill 10. -

But depositions like verdicts are regularly only evid. as between the parties & the privies & those who are privy to them. - See explanation of Privies sup. 3 B.N.P. 238. Gilb. 61. 1 Atk. 445. 3 Ves. 415, 501-2. 524. 9 Bac 314.

For the purpose of introducing an interlocutory or judgt. of a Ct. of Ch. in evid. proof of the prior stages of the suit are not in necessary. Thus to admit an answer in Chancery in evid. as of him who made it, proof must be made of the Bill. - & so, of every thing subsequent - for the bill is the foundation of the whole. Gilb. 55-6. Peak 66. -

If however in such case the bill has been lost or destroyed by time or accident, it may like any other document be proved by secondary evidence. - This rule applies to all kinds of writings, thus lost or destroyed. 5 Mod. 411. Peak 29. 67. 1 Vent 257. 3 B.N.P. 128. Gilb. 22. 2 Rich. 31. -

A Decree of Chancy is evid. whenever a judgt. of a Ct. of Law is, & is evid. under similar circumstances, - for it is precisely analagous to a judgt. at Law, & the same distinctions & mutatis mutandis apply to both. Peak 38. 40. 64. 5 8. B.N.P. 232. Gilb. 29. 32. 36. Doug. 229.

Sub. Writ.] The proceed^{gs} of Ecc^{l} & admiralty & of the Ecc^{l} & in Eng. are evid^{ce} of the same nature as those in the Ct of Ch^{y} – as the probate of a will, or sentence in a matrimonial cause, of the Eccl^{l} Ct or Sent^{ce} of the Ct of Adm^{y} in a prize case – These memorials of these proc^{gs} are public writings of the most solemnity & records themselves. 1 Vern 53. Gilb Ev. 30. 3 P.R. 125. 4 P.R. 256. Ray 405. 1 Salk 289.

In these cases the Sent^{ce} or decree is as conclusive as a judg^{t} at C.L. tho' not called a record – It is allowable however to shew that the seal or proceedings of the Ct are forged for this does not contradict the decree or sent^{ce} but shews that none exists Peak Ev. 1 Salk 289. Ray 405.

These proceed^{gs} are also provable by copies as are all other public writings Gilb Ev. 12. 3 Salk 154. Doug 593.

The judg^{t} of a Foreign Ct is also evid^{ce} of the right wh. it imports to establish & of the facts wh it professes to find. as a judg^{t} of debt in favour of pl^{ff} agt. D.

But as to the judgts of foreign municipal Cts, a distinction is to be here observed. If the party obtaining the judg^{t} in a foreign Ct applies to our Cts to enforce it, the judgt. is evid^{ce} prima facie, only however and is not conclusive, as to the claim. – So that the opposite party may contradict it, & the Ct may examine the merits by inquiring what the foreign law is & whether that law warrants y^{e} judg^{t}. – this is because the party by his application submits to the juris^{d} of the Ct – and

Pub. Writ[ten] and claim justice at their hands.

But such judg[ment] is here used by way of defence it is as conclusive as a judg[ment] of our own Ct. As if Lod sued B in Eng[land] judg[men]t for debt & sues B in U.S. for the same cause & B pleads the foreign judg[men]t in bar, it will be conclusive. — for here the proceed[ing]s are in invitum 2 Dall 316. Doug 1. Peak 70. so decided in Conn. 2 Con. Reps. Granted or Obtain[ed] in a foreign judg[men]t may be proved 1st by exemplification under the seal (mentioned also — for this seal is supposed to be known to the Cts of other nations. Peak 73 Con. Swift Ev. 9 Mass 68.

2d By a sworn copy, compared with the original & sworn to by a witness in Ct. 2 Cranch 187. Phill. Jour. 5 East 473.

3d By the attestation of the keeper of the Ct. with the seal of the Ct annexed, but this seal is not supposed to be known by the Cts of other nations so must be proved, like any thing else, by the exemption of a deed. 3 East 221. Phill 301. Gilb 20. Peak 42. 3. —

If the seal of a Ct of Westminster under the National seal was introduced in our Ct. it would be sufficient of itself for some medium of proof is necessary for the existence of national intercourse. — & the National Seal is acknowledged as this medium

Foreign Statutes may also be proved under the national seal or by sworn copies 2 Cranch 187. Swift, Ev.

How the Cts of the neighbouring States are to be proved see head, Records — How proved in Con. see Ct Con. 45. 3. 8.

Unwritten Foreign Laws, cannot be proved

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to ordinary proof evid^{ce} nor by any thing in the nature of a copy. — they being unwritten — they are provable however by the testimony of "respectable intelligent men" tho' I take it means none other than professional men, — tho' perhaps the rule may be extended, 1 Johns. 385, 394. 10 Wms. 491. The practice in this country & some of the U.S. of a neighbouring State, is by professional men. Thus by the law of Com. Counsel fees are recoverable at Law. — they are not so by the Eng. L. as part of the law by professional men, with support an act^{on} to recover the fees in a State where such law did not prevail

The proceedings of foreign Cts of admiralty, are conclusive in this or other countries as to the facts within it's jurisdiction & wh it is incumbent to establish. — wh is diff^{t} from the proof^{g} of foreign municipal Cts. — The reason is, that these Cts decide by the law of nations, & hence their decisions are not regarded by us the decisions of foreign Cts, but of the law, recognised here as well as there, Park. L. of C. 55 Bl. 192, 230.

And if a foreign Ct. of admir^{y} states the evid^{ce} on wh it finds a given fact. no Ct here can enquire whether the evid^{ce} is suffic^{t} to support the sentence or finding. — In this case however the sentence is conclusive, not as to the facts stated by way of evid^{ce}, but only as to the fact stated by way of conclusion. As the above was, that such a document being found on board was evid^{ce} of the property belonging to an enemy. Here this is not conclusive evid^{ce} that the document was on board, but it is that the ship

was

Vide Hastings was enemy's. Peake 71.

And so if the sentence of adm^ty assigns no reason for the sentence, altho it is conclusive evid^ce of the condemn^n. Park Ins^e 413. Peake 71.

But if it appear from the facts & conclusion founded upon them, that the condemnation was not founded upon any breach of the Law of Nations, but a breach of a private ordinance — the sentence is void & of no evid^ce at all^y. — for the Ct has no jurisdiction being bound to decide according to the Law of Nations 1 Dr. 522. & id 434. 566. Peake 71. 2. Park Ins^e 415.

And no adm^ty sentence has any effect by way of evid^ce or otherwise unless the Ct. who rendered it is regularly established according to the laws of nations. Thus Bonaparte authorized his Consuls in Spain to hold Cts of adm^ty & decide as to prizes — It was held that their proceedings were void — for no one is recognised by the L. of Nat. for Sovereign Power to establish Cts. 2 C. Rob 265. 2 Past. 473.

The proceedings of a Ct of Admiralty are proved by copies under seal of the Ct, the seal proves itself, — for as the Ct act under the L of Nations, all Cts are supposed to know the seal, Peake 72.

For the same reason the seal of a foreign Notary Public, proves itself, he being an officer established by the Law of Nations, & not by the municipal law, — he is an organ of communication between diff^t nations, — the rule is found in the necessity of the thing. Nouse 66. 2 Roll. R. 3465 Peake 74.

(Observe by the by that the seals of our own State prove themselves, that so with private seals & the seals of corporations. Gilb 20.1. 1 Bl.R. 58. & 982, 303. Blak 73.4.)

an award of arbitrators is as conclusive as the judgt of a Ct. — it is in effect a judgt, for arbitrators, after a due submission are a species of court. erected it is true by the parties themselves, but recognized by the law. Mills 89. Blak 75.

It is said an arbitrator cannot transfer real estate — it is true, he cannot, but he can decide the title, & order the transfer to be made & his determination is conclusive as to the title, as decree of a Ct of Eq^y. — this distinction seems not to be gen^y understood by the elementary writers. — the arbitrator cannot act in rem Blak 75. 3 East, 16. conclusive in pleas must

It has much disputed how far a protest by a sea-captain is evid^e. — these protests are very common, being made in all cases in wh he may be rendered liable, — it is now decided that they are no evid^e in chief of the facts stated in them, but may be used to contradict the testimony given by them protesting, into Ct. & they can be used for no other purpose, 2 Esp. R. 490, 691, 1 Day 91. Marshall, 616.

Executive documents are sometimes evid^e, as, the sworn copies of entries in the books of the executive officers of government, are admissable evid^e — as of Treasurer or Comptroller books. Dougl. 571. 2 R. 22.3

The same rule holds as to the votes

Pub. Writ. & proceed.s of corporations entered in their books as, on a question as to the transfer of the stock of a bank - the books of the bank, relating to the transfer are evid.e 2 Mc Nal. 475. Doug. 91. Str. 93. 3 Ch. Doug. 593. These books or entries are proved by copies. -

But if the document is in its nature private, tho belonging to a public body, still the copy is no evid.e the original must be produced. - as a letter to a corporation. Str. 401. Peak 91.

The decl.n of an individual corporator is not evid.e for or ag.t the corporat.n case, of a suit between a bank & an individual, (A) it is not competent for A. to prove the decl.n of the cashier or president - for corporat.n are liable only for their corporate acts, & they speak & act only by their votes. Dwf. E. 23.

But as to acts of the States - a Gazette published under the sanction & controul of Gov.t is evid.e, as, if a party will avail himself of a proclamation he may prove it by shewing the Gazette, a private news. paper is not evid.e - This rule is of little or no avail in this country, as we have no Court. Paper. i.e. there is no constitutional controul of Gov.t recognised. 5. J. R. 436. B. N. P. 226. 2 Mc Nal 449. - Peak 49. 5 J. R. 436.

The books of a public prison are evid.e of the time of prisoners commitment, & discharge but not of the cause of his commit.t or discharge, &. in an act.n for false im.t an entry in the books of

of the prison that pltff was committed under a lawful writ, is no evidce that the writ was lawful recourse must be had to the record to ascertain this, &c. But the Books are evidce as to the proper acts of the prison keeper. 2 Ch Crim Law 445. Peak 79. 3 Esp. 4 D. 188.

So the Log book of a ship of war is evidce of the time of sailing with convoy, & of facts of this nature 1 Esp 427. Peak 79.

A Genl History is also evidce of such facts & past events of a pub. nature as are not provable by other means — but it is no evidce of facts &c of a private nature. Salk 281. 12 Mod 85. 1 Vent 149. Skin 14. 3 Mod. 248. Peak 79 to 83.

Surveys & Inquisitions taken by authority of Govt are evide between individuals — Thus to this day the doomsday book in Eng is evidce of all the boundaries in the kingdom, So the book of the Surveyor Genl as to the boundaries of ports & harbours of the Mediterranean are evidce — for there are Pub. writs Peak 84. 1 Vol 188. 1 Burr 145. Peake Cas 182. 1 Wils 170.

But privy
ate surveys & inquisitions are only evidce between the parties to them & their privies. 2 Atk 497. Show 61. Peak 85.

When Parish Registers are kept as they are in Engd the registers themselves or sworn copies of them are evidce as to births, marriages & deaths, such events being there usually recorded — they are also prima facie
evidce

Pub. Writs evidce of pedigree. In Comm. Law wills should be rejistered in the town clerks office but is seldom done. 1 Stra 1073. Peak 86.

And the certificate of a person authorised by law to solemnise marriage — as a Majistrate or Clergyman in Comm. is evidce of the fact of marriage — as also are copies from the town clerks office

Antient Maps, that made without pub. auc. if they accompany the possession & agree with antient boundaries adjusted in accompanying deeds are evidce — This may be of service in settling disputes as to western lands — the proof of that proposition being yet accompanied with a map Gilb. Ca. 1 La Ray 704. 1 Stra 95. Peak Cas. 18.

When may the Inspection of Public Writings be ordered.

The records of Ct of justice are open to the Inspection of all persons interested, & the proper officer is bound as of common right to submit them to the inspection of all persons interested or who wish to prove any thing by them. 1 Wils 294. 2 Stra 1244. Bar Gw. 126.

Copies of the books of public offices are demandable by all persons interested unless pub. policy demands that they should be kept secret, as of the office of Secr. of State, Post office &c. 1 Stra 304. 2 T.R. 616. Peak 92.

And if an Inspection is

is refused by the officer the Ct will by a mill grant him leave to inspect them i.e. order the officer refusing to permit an inspection as to the matter in dispute. Stra 304. 1005. 1223. 1242. 2 Bac. 1215.

The books & papers of a corporation are upon the inspection of all the members interested, & in a suit between a corporation & one of its members or between two individ. corporators an inspection may be ordered by the Ct. but this cant be done in a suit between a corporator & a stranger in favour of the stranger by a Ct of Law. — (tho' in a few instances it has been done) for these books belong to the corporat. & are not like the records of Ct & executive offices — and belong to the public — so to compell the Insp. of the books of the corporat. would be to compell the corporator to furnish evid. agst himself — wch cannot be done. 1 Bac. 689. 3 ch 303. 579. 8 ch 590. 1 Atk 211. 3 Wils 398. 2 Veg 621.

Ct of Equity

However upon a bill for discovery will order the inspection of the corporation books in favour of a stranger for it is the province & exclusive province of Ct to compell discovery & as it compells the disclosure on oath it may thus inspection of books &c 2 Veg 621. 8 Bac 592. 3

In a criminal prosec. however agst a corporat. or one of the members of a corporation, no Ct of justice whatever can order an inspection of the corporators books — for nemo tenetur accusare seipsum 2 Stra 1210. 1 Wils 209. 1 Bl. R. 37. Peak C. 94. 5.

This last rule does not apply to an information in the nature of quo warranto agt the corporation - tho' the proceedgs are in form criminal, for in effect they are civil - hence an inspection of the corporation books may be ordered. 3 T.R. 574. Peak 95.

Of Private Writings.

Writings are either public or private. Pub. writings with all their subdivisions I have considered - We are now come to Private writings. -

When a fact is to be proved by a deed or other private instrument the original instrument if in existence & in the power of the party by whom the fact is to be proved, must regularly be produced - for this being the case no evid. of the contents can be produced - This rule furnishes merely an example of the gen. rule that the best evid. the nature of the case admits of must be offered. 10 Co 92. 3. Gilb 93. Peak 96. 4.

When a deed is in two parts, the counter part may be read in evid. agt the party by whom it was executed - tho' not agt the other party or a stranger Peak 96. 4. Bm. -

If however the orig. deed is casually lost or destroyed an examined copy of it, or even parol proof of its contents - for this second evid. is now the best that the nature of the case admits of - the second evid. has become best - but it is indispensable in this case that the existence of the orig. & the loss of it be first proved.

The

Pair Whit[e] & Co the bills however are not signed as to the proof of the loss — presumptive proof of it will be sufficient after the existence has been conclusively proved — 3 B.R. 151. Thos 526. 70. 4 East. 535. 1 Campb 193. —

You recollect the same rule holds as to a record — & indeed it is a general one as to all writings whatever whether public or private as suppose a bond given by A to B. & it is proved to have been lost by casualty, as burnt with all[e]ges house then B may either prove the contents of it by an exam[d] copy of it, or by parol evid[ce] as the case may be; & this evid[ce] will support the act[n] upon the bond, tho' however does not discharge A with[t] proof, but as last. he can recover for the Law will not allow a man's right to be lost, without a fault of his, — If he was in fault in loosing the instrument — he will not recover.

If the instr[t] on which the act[n] is brd [illegible] is in the hands of the adverse party & he has had notice to produce it at the trial & does not, secondary evid[ce] as in the last case is admissable — Here however it must be proved that the instrument was genuine, is in the hands of the adverse party & that notice has been given him to produce it — as should the bond get into the hands of strangers, 1 Atk 446. 2 B.R. 201. 2 Bl R 939. 294. Chit B. 216. 218. 16 Ch. R 56. Peake. ca. 165. Peak. C. 97. 107.

The same rule applies to any other document whatever, as a letter, &c. But you observe that a bill of P.L. cannot compel the def[t] to produce the instr[t] all that it can do is to admit

Where writ[illegible] a[illegible] secondary evid[ce] is admissible in the place of it.

& the law now stands the same rule as to notice obtains in criminal cases. Thus on an indictment for forging a guinea instrt if it is in the hands of the prisoner & cannot produce secondary evid[ce] unless he has given prisoner notice to bring same into Ct. — It was once thot that secondy evid[ce] cd not be produced in any crim[l] cases. But the rule is now settled to be the same as in civil cases. — 2 T.R. 201, 1 Mr & Mal 346. Leach Cr Cas 296.

But the fact of a former written notice may be proved without a subsequent notice to produce the orig[l] notice, for if plff must make out a notice to prove the 1st he will want a 3d to prove the 2d & thus in[f] go on ad infinitum without producing any practical result. Peak 108. 2 B & P. 89.

And in a civil case notice to the att[y] of the adverse party is as effectual as if given to the party himself — & the usual practice is to give the notice to the Att[y]. — 2 T.R. 208. m. 3 ib 306. Phill 19.

If the instrt is in the hands of a third person, he shall be served with a subpoena duces tecum, i.e. to bring with him the instrt required. & after service the witness shd deliver the instrt over to the adverse party — secondary evid[ce] may be introduced for now the adverse party has notice to bring the instrt into Ct. through the third person Peak 97. 4th Ed. 88, 89.

If —

Private Writings.] If there is a subscribing witness to the instrt offered in evidce he must be called in person to prove the execution of it, provided he is alive & in a situation to be called — for his evidce is better than that of any other person he being the person selected for the purpose by the parties to the instrt 5 Esp. 16. 4 id 234.

But if there are several attesting witnesses the execn of the instrt may be proved by one of them — Schack of 82 instrts as deeds, bonds covts &c. & not of devises — 4 DR 26. 2 Phill 164. 366 n.

As a consequence of the genl rule, that the subscribing witness must be called, — it is settled in Eng that even the confession of the opposite party does not dispense with the calling of the witness. Doug 216. Esp. 257. 2 B&P R 86. 4 DR 267. 1 Esp. Cas. 89. 4 id 239.

This rule however is explained both in Conn & N York — & the confession of the party is held to be as good or better evidce than that of the subscribing witness Swift. E. 259. 2 Johns 451.

The beg rule is adhered to in Engd even tho' the instrt is lost or cancelled provided the subscribing Witness is known, in such case secondary evidence cannot be produced unless the subg witness is without the reach of process. Peak 98. 1 Esp. 39. Peake Cas. 30.

And in beg the confession by a deft in an answer in Chy is not admissable evidce to prove the execution of the instrument, if there is an subscribg witness in existence Peak 98 n.

Private Writ[s] } 98 n. 4 East 53.

But where a deft prod. acct a deed before the commissioners of Bankruptcy & acknowledged the execution of it, in his deposition it was holden sufft. evid[ce] of the execution without the production of the subscribg witn[s]. — here you observe there was both a confession & a production of the deed. 5 B & C 565

So also when a party pleading the issue confess'd & agreed to admit the execution, it removed the necessity of producing the subscribing witn[s]. 2 B & P 85. 2 Esp. Cas 16.

If there is no subscribg witness, — then inspection of it is always admissable, as proof of hand writg of the party who executed it. — 1 Lew 25. Com. Dig. Evid. B 4. 5 Esp. 15 n.

So if a person whose name is subscribed as a witn[s] denies the execution of the instrt other evid[ce] of the execution may be produced as a confession, hand writing, &c. Peak Cas 146. Doug 216. 3 Esp. 193. 2 Camp. 365. 636. 10 Ves. J. 474. M. contra Mich. 1 Camp. 412. but it is denied. —

I would here observe by the bye that it is not necessary that the subscribg witn[s] shd have actually seen the exec[n] of the deed, it is sufft if the party confessed it as his deed & requested witn[s] to subscribe as a witn[s] 2 B & P. 217. Peak 98 n.

If it appears that a fictitious name has been subscribed as a witn[s] the exec[n] may be proved by prov[g] the hand writg. of the party; — for the effect is the same as if

of the deed did not import to be subscribed by a witn.
Peake has 23. 5 Esp. 16. Phill 363.

The rule is the same when the witness is interested at the time of the exen. & continues so till at the time of the trial for the witness being incompetent it is the same thing as if the deed had not been attested 1 Str 269. Stra 34. Peak. R. 107. 5 Esp. 270. & Cast. 153. Thus witness at the time gave a collateral security to obligee & he continues obliged at the trial. —

Rule the same when the witness signed without the knowledge or consent of the parties, here he in fact is no subscribing witness but a mere volunteer. 3 Campb 286. 2 Taunton 220. Phill 363.

Same rule holds if after due enquiry nothing can be heard of the subscribing witness. Phill 364. 1 Bragl. 286. 3 Bin. 192.

Same rule holds if the subscribing witness at the time of the execution of the instrt was legally infamous. — for in this case as his oath will be of no avail, proof of his hand writing will not avail, — his hand writing shall not be proved whose oath will not be rec'd. — proof of the hand writing of the party will be insufft. Phill 364.

The criterion by which to judge when the hand writing of a witness & when that of the party may be proved, is this, If the instrt is in effect as if it did not import to be attested at all the hand writing of the party may be proved, & the execution may

Subscribing Witness may be proved comparison by a Bye Stander &c. Any other evidence will prove an oath in any case Doms. D. Evid. R. 3. Peake Cas 145. 10 Vez 474. 4 East 577. 5 Esp 16. -

If a subscribing witness becomes interested after the exec. by operation of law, as by becoming Exec. proof of Witness hand writing & sufft — none is here necessary proof of the hand writing of the party because originally the instrument was properly attested. — The incompetency of the witness is subsequent. — In the former cases the instrument was as in law unattested 2 East 183. 10 Wms 289. Stra 34. 5 Bac 312 Phill 362. A clear understanding of this distinction will remove all embarrassment as to cases, when to prove the hand writing of the party & when that of the Witness

Proof of the parties hand writing when that is proper proof according to the rules laid down above is prima facie evidence of the sealing & delivery. Peake Cas 145. 10 Vez 474. Phill 364.

If the witness is dead or suffered to be no proof of his hand writing is sufft proof of the exec. of the instrument. 11 Mod 60 7. Peake 100. 1 Wms 360. 4 Bac 266. 1 Johns 290. 1 Johns Cas 280. 2 Att. 46. -

So also if the subscribing witness becomes blind so that he cannot identify, or becomes a lunatic, proof of his hand writing is sufft — for in both cases the attestation was sufft but witness cannot swear to it 1 La Ray 704. 6 Esp 16 n. 9 Vez 3 81. 4 Wms 963. -

The rule is the same when the witness after the exn. of the deed becomes legally infamous. 2 Show 833. Esp D 256. 5 Esp. 16n. Phill 566.

So also if the attesting witness at the time of trial is in a foreign country, whether he is domiciled abroad or not, his hand writing may be proved as sufficient evidence of the exn. 2 Cost 250. Esp. D 256. Peak Cas 99. 1 Esp. Cas 1. Peak C 100. 7 T R 266. Doug 93. 1 B & P 361. -

Rule is the same if the attesting witness after diligent search cannot be found - for the witness himself cannot be procured to testify Doug 89 or 93. 2 Cost 183. 7 T R 266. 2 Camp D 282 1 B & P 360. 11 Johns 64. -

Now in all the above cases if the subscribing witness is not in a situation to be examined, proof of his hand writing has been held to be sufficient & the best evidence. And if there are several witnesses none of whom are in a situation to be examined, the proof of the hand writing of any one of them is sufficient Phill 169. 364.

And the proof of the hand writing of attesting witness has been held sufficient without any proof at all of the hand writing of the parties, - tho' it has been usual to prove both, - the weight of acc. is that the proof of party's hand writing is not necessary, some contradictory opinions, & I never should see myself why the proof of witness hand writing should be better evidence than that of the parties - for if the witness was present there is no certainty that he would swear to the exn. Peak C. 99, 100. Phill 169. 362. 3. 2 Cost 183. 250. 1 B & P 360. 4 Johns 461.

7.

Prior Writs 3 7 & R 266. - that the party to hand writ. must also be proved see 7 & R 266 n.c. 2 Haywood 27. 3 Binny, 192. 1 Bay 255. 2 it 187.

The proof of the hand writing is the proof of every thing on the face of the instr. as the attestation is signed sealed & delivered in the presence of wit. 1 Camp 373. Phill 363.

In Comm. when the testimony of subscribg wits. cannot be had for the reasons mentioned above, the practice is & has been to prove the hand writs. of the party, tho it is here advisable to prove the hand writs. of wits. also. Swift 99. 6.

If there are several joint obligors & no subscribing witness to one of them is dead, another of the obligors may be allowed to prove the exn. of the bond by dft. Stra 96. Phill 364 n. - This seems to me to be a questionable principle - it is true the confession of one is good agt the rest but now the suit is not vs. the writg. has a direct interest in the event.

When in the foregoing cases it is said that the evidence is sufft. proof of the exn. of the instr. it is meant that such evidence is sufft. to let in the instr. as evidence to the jury - i.e. to render the instr. admissable to the jury.

If there are two subscribing witnesses & only one of them is in a situation to be examined, the other must regularly be produced to prove the exn. - proof of the hand writg of the other will not discharge his attendance, Peak 101. 2.

But if both are in a situation in wh they cannot be examined, as one is dead & the other in a foreign country, proof of the hand writg of one is suffn by the Eng h law. tho' it is more safe to proof the hand writg of both — this is sometimes done 2 B & P. 360. 1 McNal. 310. 2 East 250.

In all the preceding cases, where the subscribg witness cannot be examined — if the instrument purports to have been sealed & delivered, it is suffn to submit the jury in the presumption that all necessary formalities have been complied with Peak 99. Gilb 101. Bull. N.P. 254.

In proving Devises, to the validity of wh the St. requires three subscribing witnesses shd be examined in this case one shd be produced — the attendance of one is not to be dispensed with if he is alive & in a condn to be examined Peak 101, 2. Bl. 696.

If the witnesses are all dead it is necessary to prove the hand writg of all of them & also that of the Testator — in this the case here differs from the proof of the execn of B.L. instrs Com. R. 531 Stra 1109. Peak 101. 370.

And in such case unless there are strong circumstances to the contrary, a compliance with all the requisites of the St will be presumed. 2 Atk. 2 B.N.P. 265.

If the witnesses are all living their evidence is sufft if he testify to all the requisites — unless the execn be disputed. in wh case all in a condn to be examined must be called — & testify that they all signed

Private Writ. devises } signed in the presence of the testator
1 P.W. 741, 1 Bl. R. 365. 4 Burr 2224. 2 W.Bl. 864. Peak 101.

But a Ct of Eq will never deem a devise as proved unless all the witn. capable of testifying, are examined — even tho one of them is beyond sea — & the devise is not disputed. — This is because the decree of Ch. as to the probate of the devise is conclusive ag.st all the world. Rand. 2 714. 1 Wils 216. 1 Vez 117. —
There is no incongruity between this & the general rule that one witn. if credible &c. — The diversity arises from the diff.t effect of the probate in the two cases. In the first relates to com.n suits at Law the aud. to the proved the devise in Ch. the 1.st is conclusive only ag.st the parties to the act.n the 2d as abd above is conclusive ag.st all the world. —

Our Probate Ct will declare a will proved upon the testimony of one witn. if he swears to all the requisites — but from this decision there is an appeal. Swift C. 27.

Though all the subscribing witnesses to a devise shd deny the exn. of it still it may be proved by other witn. — but they are 1.st to be called — for the law will not dispense with their presence — tho' it will allow their testimony to be rebutted 1 Bl. R. 365. 2 W.Bl. 864. 2 Stra 1096. Shinn 99. 413.

When the deed offered in evid.ce was executed under a power of Att.y — the exn. of the power of Att.y as well as of exn. of the deed exn. under it must be proved Sug. L. Pow. 262 1 Ch. 90. 4 Ves 299. Swift C. 28. —

How is the hand writing to be proved? It is a rule in proving the hand writing of another, the belief of the witness must be received - & it is received both in civil & crim. cases, - as a witness swears he believes the signature to a bond is the signature of A.B. 1 Burr 642. Peak 102.

But to render this belief availing at all, it must be founded upon a familiar acquaintance with the party's writing & without this acquaintance his belief is good for nothing - this acquaintance must be founded or derived from seeing him write or from a course of correspondence it is not enought that witness has seen writing or signatures purporting to be his. 1 Burr 642. 1 Bl. R 384. B.M. 295. 296. Peak 102. 104. affd. 11. 12.

And the witness having seen the party write pending the suit for the purpose of letting the witness see his writing - is of no avail - for the party may have written so as to deceive the witness, so as to let in such evidence will be to allow the party to make evidence for himself. 1 Esp. R. 14. 15. Chit. 320. Mi. Nal 421. 4 Esp. 273. cn.

And the witness in testifying must enter into no speculations from the appearance of the writing & must not take into consideration any circumstance fact whatever, - as he does not think the party would have made such a bond &c. - Peak Cas 142. - Peak. C. 102. 3.

And in proving the hand writing of a witness evidence that other writings attested by him were forged is not admissable to contravene any presumption arising from

Pris Writ. Hand Writ. from the proof of his hand writ. for the part of forgery of other writ. is altogether irrelevant. Peak 103 n.

Under this head much dispute has arisen from what is called, Comparison of Hands. It is a general rule that Comp. of hands is not evid. in any case criminal or civil 1 Burr 644. Rul N. P. 296. 2 Bl 356. 4 Bl. 497. 1 Esp 351. 4 T. 273. a & b. Peak 104.

In the books I find no definition as to compar. of hands. where has arisen some confusion. but. by it is meant, Either a comparison to be made by the jury between the writing in question & another proved or admitted to be the writing of the party Or a similar comparison made by a witness who is to testify his opinion from the similarity or dissimilarity of the writings. 4 Esp. 273. a to e. Peak 104. — How this is not allowed as evid.

and the rule applies as well to criminal as civil cases. — Tho' it was once understood applicable only to civil cases. hence arose the disgust expressed at the decision agt. Colonel Lindsey. — But notwithstanding the opinions of Judge Blackstone & Chitty. I think the decision of that case as to this point is perfectly legal see the case Phill 366. — That the rule is applicable to both civil & criminal cases see 1 T. Gilb 53. 1 Mod 294. —

In law it has been decided in one or two cases that compar. of hands by the jury was allowable — But I think it is not decided law now. it is not any where else Swift E 30. 1 Root 107. This is because the

the juries of this State acknowledge to unite who can judge as to the character of the hands. — but I doubt whether twelve men were ever empannelled who were competent judges of this fact. — for great skill is necessary, in the comparison.

But when from the antiquity of the writing personal knowledge of writers hand cannot be had, a person who has made himself acquainted with the character of it, as by frequent association with a parish register, has been allowed to judge from similitude but it is allowed as necessitate. 1 B. N. P. 236. Peak 104.

And it seems that persons professionaly skilled in detecting frauds in writing, as Clerks in a Post office employed to detect forged franks. — may testify their opinions, formed from the appearance of the writing, whether it is a feigned or disguised hand or not — But in Eng[d] the rule is carried no farther they are not allowed to compare hands, as has been done in this state. 2 Esp. 499. 2 Esp. 145. Peak 105. 6. Abb 11. 12. Ld Kenyon opposed to this. — but his wrong. —

There are cases in wh an instr. may be read in evid[ce] without any direct proof of its exec[n]. This when the opposite party brings an instr. into Ct upon notice so to do, or the inst comes out of the hands of the opposite party or the witn[s] not known to exist, so that he cannot be supposed to prove the exec[n], the exec[n] is prima facie good Peak 108. 9. 5 Esp 17. 2 Esp 434. —

And the rule was one

Pic, Whit[s] once held to be the same, when the party who produced the instr: was not a party to it - but this has since been overruled & I think very properly, for he is not presumed to know whether it is genuine or not even that he may have an interest in it. 8 East. 548.

It is an established rule, that a deed of thirty years standing may be read in evid[ce] without any proof of its execution provided the possession has followed the terms of it, & there is no apparent erasure or alteration — this rule arises of necessitates. - The period is fixed for the sake of certainty. B.N.P. 255. Gilb 100. 1 Esb. 275. 2 Str. R. 532. 2 Str R 466. 5 it. 259. Esb D 774

This rule being founded on presumption does not hold in case where there are circumstances from which a contra presumption arises, as in case of erasure alteration, possession Law[s] possed, maugre the deed. - B.N.P. 255. Gilb 100. Peak 110.

The recital of one deed in another has been held suffic[t] evid[ce] of the exec[n] of the recited deed as ag[t] the party to the existing deed. Thus a deed given by A. recites & annulled a former deed given by himself, this rec[l] is suffic[t] evid[ce] of the exec[n] of the first. Salk 286. Peak. 11.

This species of evid[ce] however is now regarded as only secondary and is therefore admissable only when the recited deed is shewn to be lost, or some other sufficient reason is given for not producing it. Hardr 120. 2 Lev 108. 6 Mod 46.

Formerly if there was any erasure alteration or interlineation, the judge decided on proof of it whether it was by and consent or not. But now this question is left to the jury on the face of an instrument. 10 Co 92. Gilb 104.

Ev. for Written Instrum^t may be explained by extrinsic evid^e. A deed or other instrument when proved is conclusive as to the parties to it, - hence neither of them can contradict it by parol evid^e. the deed being of much higher evid^y than parol testimony possibly can be. 6 Co 65. Gilb 165. 3 Mod 275. 1 Bro Ch^s 90.

The meaning of the rule is that neither of the parties can contradict the terms, statements or stipulations of the deed - as if a bond is given, payable immediately it is not competent for the obligor to prove that it is payable in future. - Or a convey^e to A for his life &c - cannot be rebutted by parol proof that the convey^e was only for A's life.

But a Latent ambiguity arising in the construction of a deed or other instr^t as a devise, may be explained by parol evid^e. 1 Ld R 713. Gilb 186. 1 Bro. Ch 472. Peak 112.

By a Latent ambig^y is meant an uncertainty arising not from the face of the instr^t but from some extrinsic fact. provable by parol. Now as this uncertainty is created by the parol evid^e of a fact it may be explained & removed by the same kind of evid^e. Case of a devise "to A B." - A there proves to be two persons of that name, - & from this extrinsic fact

fact

Prov. Wills. Mistake & Fact. It may be shewn by parol evd of the cause the Testator had reference to. 1 Bl 60. 5 Co 68. 8 id 155. 1 Ves. 112. 2 id 35. 2 Veg 206.

The rule is the same if the devisees name is mistaken or wrongly written in the devise as when the devise on the face of it was to A.B. evid. that this was the name testator called the devisee by tho' not her right name was admitted. But had there been another person of this name, the devisee wd have lost the devise 2 P.W. 741. 1 Day 11.

But when there is such a mistake the declarations of the testator made long before this death time of making his will are not admissable evid. — to admit this wd be going too far astray from the instr. itself 6. T.R. 674. Peak C 114 n.

If however the name of intended devisee is entirely omitted — it cannot be supplied by parol evid. — for this is a Patent ambig. & to suffer the blank to be filled up wd be to allow a parol devise 2 Co 240. Peak 117. B.R. P. —

And in case of Latent ambig. such circumstances as will go to prove the intention of the testator are admissable evid. 1 Roll 575.

When a right name but a wrong description is given to a dev. the devise may still be carried into effect by the aid of parol proof. provided there is no other person to whom the description applies — But if there is such an one the devise is void from uncertainty

As.

as the name applies to one person & the description to another Case of a devise to the eldest son of J. S. now of L. has no son then AB will take, but if J. S. has a son whose name is not AB. then the devise will be void. & so if the description was right but name wrong. as to AB Bishop of London. 1 Bro Ch. 30. 1 Veg. J. 266. 6 Ves 42. 5 TR 671.

So also parol evid^{ce} is admissable to rebut an equity - or to oust a presumpt^{n} or implication arising upon the face of the instrum^{t}

As to the 1st branch of the rule, viz that parol evid^{ce} is admissable to rebut an equity - Thus if A files a bill for specific performance agst B. on a written agreem^{t} if there has been a parol agreem^{t} varying the terms of the instr^{t} - this agreem^{t} may be proved to rebut the equity for the specific performance. The rule applies only to cases in Ch^{y} it does not apply at Law & it applies in Ch^{y} only because it rests in the discretion of the Chancellor to enforce an equity or not. But parol evid^{ce} cannot be admitted to support an equity 1 Fonbl 384. 1 Vern 240. 1 Raw. Ch 422. Talb. Cas. 29. 3 P.W. 40. 1 Bro. Ch. 201.

The 2d branch of the rule is, that parol evid^{ce} is admissable to oust a presumption or implication arising from the face of the instr^{t} Raw presumpt^{ns} & implications prevail when there is no evid^{ce} to rebut them. It is a gen^{l} rule of the C.L. that the undisposed surplus of testators estate goes to the Exec^{r}. but if the testator gives his Ex^{r} a Legacy. Ch^{y} say it raises the presumption that it is given in

Pow. Wills } in lieu of the surplus & therefore he ought not to have it — how the Ct is allowed to produce parol proof of testators intention to rebut this presumption of equity — in favour of the rule of Law. Peak 113. Salk. Cas. 240. B.R.O. 297. 1 Pow. C. 427. 2 Atk 58. 220. 2 Vez 91. —

Another example of the rule. It is a gen[l] rule that the marriage of a testator & the birth of a child after making a will revokes it — or the ground that had he made the will after these occurrences had taken place he would have made it diff[t] — but parol evid[ce] is here admissable to show that testator intended the will to stand. 5 Ves 49. Doug. 31. Peak 114. 2 Atk 516.

But the presumption of revocation arising from the change of testators estate cannot be rebutted by proof parol of his intention for the revocation does not depend upon the intent but a positive rule of Law. Case of convey[ce] to a Stranger. 2 Atk 510. Peak 114.

A Patent ambiguity is one arising out of the terms of the instr[t] and appearing upon the face of it — such ambig[y] cannot in gen[l] be explained by any parol evid[ce] whatever, because the ambig[y] is not here created by parol proof so cannot be explained by it like the latent ambig[y] but it is a quest[n] arising from the face of the instr[t] — a matter of construction. 2 Vern 624. 3 Bro Ch 311. 2 Atk 239. 3 ib 257. 3 Vez J. 148. 4 ib 680. Case of a devise to one of the sons of S. — the instr[t] is void from uncertainty. as on the face of the instr[t] there

appear to be several sons of J.S. & no one is specified who shall take. -, - So a devise to one of the inhabitants of the town of Goshen. or one of my buildings &c.

But in some exempt cases patent ambiguities have admitted an explanation of words not in themselves ambiguous. a construction varying from their ordinary import — not however by proving the intent of testator but one inadmissable / but by proving extrinsic circumstances of the testator, change in the value of the property, in test^rs family &c. — The cases of these patent ambig^s are numerous, see them tit. Devises. I give you but one case here. it is that of the Bell tavern. — the question was whether J.S. sh^d take a life estate or an estate in fee on the face of the instr^t a life estate was given, but such an estate J.S. already had — so then to give effect to the will — J.S. must take a fee, & so the Ct construed the devise — examine the case 1 Bro Ch 492. see also Powell Dev. 502 to 519. Peak 116. 2 Eq. Cas. 288. 3 Burr 1898. Pr. Ch. 71. 1 Salk 234. Bell Tavern — 2d Ray 891.

But parol testimony is not admissable to contradict enlarge or restrain the terms of a written instr^t as a lease for 20 years reserving rent of $100 per ann. parol evid^ce is not admissable to shew that it was a lease for only 5 years. Or that but $50 rent was reserved 2 Bl. R 1246. 3 Wils 275. 1 Bro Ch. 92. 249. 1 Forbes 188. 6 Mod 452. 1 Powell C 429. 431. Comyns 49.

But collateral matter about wh the written instr^t is silent & not connected with may be proved by parol.

Pow. Writ. 2d. parol, as a lease at such a rent & for such a time & nothing said about repairs i.e. in the written instr. parol proof may be admitted to shew who is to repair. 2 Ld. A. 1250. 8 Co. 169.

And parol proof is always admissable to shew that the instr. in question is, or is not the act of the party whose act it imports to be — as fraud in the exec. of a bond — it is competent for deft to shew by parol that the fraud, or that the bond was not delivered by him &c &c as the case may be — & so that the deed was falsely read. — for here the evid. is not introduced to shew to contradict the written instr., but to shew that the instr. so claimed does not exist 8 Co. 147. Peak 98

And so if a bond was given upon an illegal consideration, as usury. — & for the same reason 2 Wils 347. Dow & Ry 3 Co. 494.

So parol evid. is also admissable to shew that an apparent illegality in the instrument was occasioned by the mistake of the Scrivener, as he made it to draw more than legal interest contra to the agreem. & direction of the parties — for this evid. shews that the instr. was not the act of the parties it not coinciding with their intentions. Ld. C. 501. —

If ambiguity arises upon an antient instr., proof of an uniform usage under it, — it being in the nature of a practical construction — may be admitted to explain it 3 Atk. 576. 3 Co. 279. 288. 4 Ib. 810. 6 Ib. 388. Dow. 245. 4 East. 327. — How ag. you perceive the evid. is not

evid.ce is not of any parol agreem.t of the parties introduced to shew what was to be meant by the instr.t but it is of notorious facts wh are received as a kind of construction,

But upon modern instr.ts such evid.ce cannot be rec.d — in the former case the usage is in the nature of a prescriptive right — one case contra Cowper 819. but it is not law as see 3 Wes 298. 6 ib 297. 2 Brown Rep. 449.

I have often spoken of "written instruments" — Lord M.d here observe that writings not under seal may by the L.d be explained & controuled by parol evid.ce with the single exception of a devise — for such writings are not considered as written agreem.ts but mere memorandums of agreem.ts — those of a receipt in full of all demands, it may be rebutted as 2 T.R 366. 5 Wes 6.th 87. 1 Johns. Cas. 145. 2 Johns Rep. 378. 3 ib 319. 5 ib 85. 6 ib 389. 9 ib 310. 12 ib 531. Phill 464.

Parol Evidence.

Under this head the point enquiry is Who are Competent witnesses & who not?

It is here to be premised that a wit.ss is said to be comp.t when he may legally be allowed to testify at all, & this comp.cy is always a question of law to be decided by the L.d because it is a question preliminary to his examination

The credibility of a wit.ness or the credit to wh his testimony is entitled, & this

Parol. Evid.ce Competency is a matter of fact to be left to the jury, in the nature of things then the quest.n of compet.y precede that of credibility, it must be established before that of credibility arises. 1 Bur 414.

As to the gen.l enquiry then all persons not rendered incompetent by some legal disqualification are of course admissable wit.ses 1 Mc Nal 95. 6.

But there are many grounds of disqualification, 1st No person can be admitted as a Wit.s who is not compos mentis i.e. in full possession & exercise of his understanding Gilb 144. Peak 129. hence Lunatics excepting lucid intervals & Ideots are not comp.t or admissable wit.ses synonymous words here. — R.M. 293. Gilb 144. Peak 129. 3.

The same rule & for the same reason applies to Infants of so tender an age as to be incapable of understand.g the obligation of an oath. As to this point the rule is, that an Inf.s of the age of 14. is prima facie as comp.t as an adult. — So that the onus prob. of his want of understand.g lies on him who objects to his competency. Stra 700. Peak 129. 1 Anst 56. 1. Hales P.C. 163. 1 Mc Nal 149.

Under the age of 14. the Inf.s comp.y depends upon his understand.g wh is to be determined by a previous examination to be made by the Ct. — the presumption lower as to his competency. Gilb 144. Peak 129.

It was formerly supposed that

that a person under 9 years of age, ought not in any case or on any terms be admitted to testify, indeed it was unusual to admit them under 10. but they were rejected as of course. 1 Ha. 701. 1 McNal. 153. Peak 123.

The rule now is that a child of any age may be admitted if he is acquainted with the nature of an oath, & so appear upon a previous examination, & in modern times one of 7 years of age was admitted in a capital case, & the conviction was founded principally upon her testimony. 3 Bn. P 293. Peak 129 n. 1 East. Cr. L. 441. Gilb. 144. 1 McNal 149. 154. Leach Cr. Cas. 114. 346. 482. East. Cr. L. 70.

Formerly Infts too young to testify under oath were allowed to give what was called "information" or without oath — but this practice is now exploded — & nothing now is testimony but what is made under oath or what is equivalent to it 1 McNal 150. 1. 291. 2. 1 Hale 634. Leach 114. 164. 346. 1 Atk 29.

The condition of Slavery is not at all an objection to the competency of a witness. 1 McNal 150.

A person deaf & dumb of capable of understanding may testify by signs, through an interpreter — but this interpr. must be sworn as in a Ct of justice 1 McNal 150. 7. 2 Hawk 432 n. Leach 316. or 347. 394 or. 455.

Mere Ignorance may disqualify a person to be a witness, thus where it appears upon the previous examination

that

Compett. of Witn. That Witn. is ignorant of the oblig.
of an oath & of a future state. for by the Law of evid.
no person shall be examined who is not acquainted
or does not understand this oblig.ation, Lee 480. An
Indian was examined before the comm. Lieut. Gov.
Are you a Christian? Ans. No nothing but a Prohibi-
tionian! — he was admitted.

A person by any infamous
is incompet. to testify in any case, Peak 124. Gilb
139. 1 Inst 6 b 156 a, 158 a. Stra 633. 1148.

By a person by
infamous is meant, one who has been convicted of
some crime infamous crime, as treason, felony, —
crimen, falsi or perjury or forgery — & any thing wh.
impeaches his integrity as barratry & conspiracy
2 Wils 18. Comyns. 2. 5 Mod. 75. 1 Mc Nal 216 & 263.
Salk 690. Stra 1148. Gilb 139.

The rule formerly was
that a conviction of a crime wh incurred an
infamous punish.t as the pillory was a disqual-
ification, no matter what may have been the offence
But now the infamy depends upon the crime without
regard to the punish.t 1 Inst 6 b. 2 Hall. 277 8. 1 Mc
Nal 210. 206 to 208. 2 Wils 18. Salk 689. 690.
Hence conviction of an infamous offence as barratry
renders the Witn. incompetent even tho' the punish.t
sh'd be but a fine — wh is not infamous. Salk 690.
2 Wils 18. Gilb 140. Peak 127.
On the other hand a conviction of an offence not infa.
as a libel — tho' followed by an infamous punish.t

as,

as the fitting does not destroy ones competency.
3 Lev 426. 1 Mc Nal 207. Gilb 141.

When legal infamy is the consequence of conviction merely, the party is restored to his competency by a pardon from the Executive Govt. — as convict. of perjury. & the pardon from the King — 1 Vent. 349. 2 Ray 257. 8. 1 Mc Nal 213 & 217. 2 Salk 689. Cab. 724.

But when the incompetency, is by St made a substantive part of the punishmt. — a pardon by the Executive Govt does not restore the party to his competency, as, a conviction of perjury under the St. Eliz. — for the pardon does only dispense with the legal consequences of the judgt. but does not destroy the judgt itself or a substantive part of it 1 Mc Nal 295. Salk 514. 690. 3 Lev 426.

In the latter case where legal infamy is a part of the judgt. nothing short of a reversal of the judgt or a St. pardon will restore the competency of the party. — Salk 689. Com Dig. Testmoin A 5. —

If one is convicted of a clergyable offence & is burnt in the hand the burning restores his competency for it amounts to a pardon by St. since by St. it is a substitute for the execution. Ray 380. Hutchings v. 8. Leach 115; Peak 126.

But a conviction of an infamous crime without a judgt in pursuance of it is no disqualification of a Witness, for you recollect a

Vaid Evid.ce compel.d a verdict without the jury's consent it is in no case evidence of the facts found by it. Bull. N.P. 243. Stra 161. Peak 49. Com. D. Evid.ce A6. Testimony A5.

But proof of the infliction of the punish.t ordered is never necessary to make out the incompetency of the Witn.s for the infamy incurred does not depend upon the punish.t if the conviction is had & judg.t rendered the infamy is complete 1 Wils 18. 5 Mod 75. Com. D. Test A1. 5.

A1. 6 it seems now to be settled as principle, after a series of contradictory cases, that the proof of Witn.s legal infamy can be made out no other way than by producing the record of his conviction, it was formerly to enquire of the Witn.s upon his Voire dire whether he had not been convicted of an infamous crime - upon acc.t I know not but this may be law now. But the later rule is the best. 2 East 92. B.R. 1 Bl. 292. Com. D. Testm. A5. 1 Mc Nal 256. Salk 693 12 Mod. 564 - as to the old practice see 4 T.R. 469. 1 Mc Nal 210 to 213. 256. 3 East 452.

It is not settled practice in our Courts as a Question fully settled whether the old practice is followed or not but upon principle it ought to be followed, For it is a firm principle that no man shall be compelled to answer quest.s which will accuse or disgrace himself & again no man shall be declared infamous except the best evid.ce of his infamy be produced. And in this case the rule is the best - 2 Campb 210. 518. 13 East. 38n 1 Phill 206. & 205. Salk 153.

Where

Prod. Title } Whether a Witness is bound to give evid.
who would subject himself to a civil suit, seems not to
be settled at L.L. on cov.t agst. A. & B is called to swear that
the cov.t was made between himself & Lft. — by L.t Gen.l
he must give in the evid.e Phill 204.

The rule that a
person legally infamous is disqualified to testify relates chiefly
to suits between other parties — for he is competent to make
affidavit in defence of a charge brot. agst. himself — as a
motion is made for an information & issue agst. him
now if his affidavit is not allowed he may be without
the means of defence & exposed to injury from any petty
informer. Salk 461. 1 McNal 211.

The gen.l character of a
Witness not legally infamous may be proved — not indeed
to exclude him as incompetent, but to detract from
his credibility. — for no one is convicted on the ground
of any disgrace attached to his character, unless it renders
him legally infamous; The evidence ad the law admits
thus to impeach the credit of Witness is confined to his gen.l
character — particular facts — can not be proved, — for with
the Witness a the party producing him is authorized to
come prepared to oppose specific facts, — but is supposed
a man is always prepared to defend his gen.l character
Bull. N.P. 296. 4 Esp. 102. 2 Phill. 212. Peak 125.

And since the evidence
relating to Witness gen.l character, can alone be given
by those who are acquainted with his gen.l character,
& appropriate great by the Rig.t L.d K. put, Q. Whether in
the opinion of the impeaching witness the impeached
ought.

Compet.ᶜʸ of Witᵉˢ ought to be believed under oath, or whether he will believe the Witᵉˢ impeached — when under oath. Peak Cas 11. 4 Esp. 103. 4. 2 Phill 212. Peak 125.

The town, on the other hand, a Wit. called to impeach another, can never give his own opinion — this is, & ever has been our practice — The quest. put is, "What is the gen' reputation of the Witᵉˢ for truth & veracity" an obscure question, —

But notwithstanding specific charges cannot be alledged agᵗ a Witᵉˢ to shew him incompetent, still the party producing the Witᵉˢ may call upon those impeaching his gen' character for the grounds of their opinions as to this gen' char.ᵉʳ — if these grounds are frivolous — little or no regard will of course be paid to their testimony. 4 Esp. 103. 4. & it acc.

If the Witᵉˢ to a devise are all dead, & fraud in the exᵉᵗ of it is imputed to them, the devisee may give in evidᵉ as to their gen' character for probity, and Blake it the ma no be the same in case they were all alive — the rule is laid down as above, because they were dead, in the case in wh the point was decided — but the propriety of the rule does not depend upon the Witᵉˢ being dead. 4 Esp 50. Phill 212.

A previous declaration made by a witness out of Ct, if inconsistent with his evidᵉ given in Ct may be given in evidᵉ to impeach his testimony — but it does not go to impeach his character, — It also may a

a letter, or a declaration previously signed by him, & being inconsistent as such to be given in evidence &c. - 2 Esp 259. 691. Park 558. 1256. 3 Evans 279. Phill 212.

after the death of a subscribing witness to a will, his confession made on his death bed that the will was forged, may be given in evidence to impeach the presumption arising from his attestation; but a confession of his under other circumstances will be of no effect at all, but the fear of death gives his confession the solemnity of an oath. 2 Burr 1244. 1255. 1 Mc Nal 366. 6 East 188.

But the party producing a witness is never allowed to impeach his character either generally or as to specific facts - for it would be enormous to suffer one after having sworn a witness into Court to destroy, & unsworn that witness - But he may contradict the evidence of one witness by the testimony of another, but how the second witness is introduced not for the purpose of impeaching the first witness but to correct him - & tho his character may be incidentally affected by it still he must submit, for necessity requires it. - B.N.P. 292. 2 Campb 556. Phill 213.

As one party may impeach the general character of the witness of him, so the other may introduce testimony to support the character of his witnesses, but this regularly ought not to be done until an attack is made by the adverse party - for a witness character is always presumed good, until attacked. - Phill 212.

In our practice a party on

Parol Testimony on his witness being impeached may by way of answer prove that the witness has before on another occasion made the same statement. Disputed by the Eng. books B.N.P. 294. nisi dubitat. Gilb. 195. 1 Mod 182. support com. rule. – see also Phil 212.3.

The testimony of a witness is discredited by proving that he was intoxicated at the time of the transaction – for it shows that he was incapable of observing correctly. 2 Day 201.

An accomplice – particeps criminis – that the fact of being such must impeach his character, may testify for or ag.st his fellow. – It goes only to his credit.

When however he testifies ag.st his fellow in a civil suit, he is clearly interested – for a recovery ag.st one tort-feasor is a bar to an act.n ag.st his fellow Hardw 163. 2 Hawk 608. 9 Shaw 420. B.N.P. 286. Esp D. 425.

If an accomplice whom the Pros.r or Plff wishes to call as a witness is made a party to the pros.n or act.n by inadvertency or otherwise, the Plff if the case is civil may with leave of the Ct. strike out his name & examine him ag.st his fellow – If the pros.n is public the Pros.r may enter a nol. pros. as to him for the same purpose. B.N.P. 285. 1 Sid 441. Peak 135. 9.

That accomplice has received a promise of pardon or reward of his giving evidence, goes only to his credit & not to his competency – for the second is that he shall give

evid.ce

evidence, & of course it is understood he shall give human evid.ce But if he sh.d stipulate to give evid.ce agt the def.t State it, it will go to his competency 1 Mc Nal. 140. 200 Keyl 16. 2 Hawk. 288.

It was formerly supposed that Infidels & Pagans were incompetent witn.es as having no due regard & the obligation of an oath. 1 Dust. 5. 7 Co. 17. Peak 139. 140. Ld Coke was very zealous in the support of this rule, he having a strong belief that none but a christian cd possibly speak the truth & not err by mistake.

But the rule now is that no persons except Atheists are excluded on this ground, i.e. none are excluded who believe in the being of a God — a future State of retribution & the obligation of an oath. — But such as disbelieve that all or any of these doctrines are incompet.t 1 Atk 21. Wills 533. Leading Ld Cast case on the subject — 1 Wils 64. Stra 1104. 1 Mc Nal 64. 95. 6. 2 Str. 1087 Atk 45. 1 Mc Nal 95.

The proper enquiry then upon this subject is not whether the witn.es believes in the Bible, or new test.t but whether he believes in the being of a God. &c. &. And the question whether he believes in the Bible, christian religion &c are very improper. — Peak Cas 11. 1 Mc Nal 281.

The question whether the person offered as a witness believes these doctrines, is usually determined by the Ct. on an examination of him without oath, before the testifies in chief. 1 Mc Nal 281. Peak. Cas 11. —

Compet. Witn. ns 3 This enquiry however is some times made after he has testified, by way of a cross examination but this course is preposterous, for the objection goes to his testifying at all — & this I believe is not now considered as the correct mode. 1 Mc Nal 229. 4 Dag 58.

And ought to have in one case admitted the previous declarations of him offered — to shew his disbelief in the religious doctrines. 1 Dag 57. — but I cant think this correct.

Quakers who think it unlawful to take an oath in any case are admitted by Early Org to give their Evid. without oath, upon affirmation in civil suits, but not in criminal, as 1 Ld Ray 708. Hen 3d & Geo 1, 1 Geo 1st 22 Geo 2d 2 Burr 1117. Stra 854. — 872. 946.

But in a criminal case a Quakers affirmation in form of an affidavit may be read to exculpate himself — as on motion for an information or attachment agt. him. 2 Burr 1117. Peak 142.

By our St. I believe it is the same through out the Union Quakers are allowed to testify on affirmation in all cases criminal as well as civil 1 Com. 559.

Another & the most usual ground of incompet. in a witness is interest. Formerly an interest in the question, or trial in any case, rendered the witness incompetent. 1 Salk 283. Stra 1043. 2 Ray 1000. Peak 144. 5. as well as an interest in the event. —

By an Interest in the Event is meant the interest wh a witness has or rather the influence he is under from being in the same situation as the party by whom he is offered, in relation to the facts to be tried, or in other words the influence he is under of having or being exposed to some claim wh may arise out of the facts in question, tho his right would not be affected by the verdict of the case on trial Phil 35 & 37. Bak 144.5.

Thus in an act. agt. on a policy of Insurance, agt. one of sevl underwriters, - another underwriter who is offd in evidce by him sued has an interest in the question for tho' the suit is not agt. the witness title the facts wh must be proved, & will subject or exempt the defts in the present act. will subject their exempt the witness in a subsequt act. on the same policy tho the record of the present act. could not be adduced in evidce agt. witness in such subsequt act.

Agt. if three persons severally indicted for perjury in the same fact. How if A is called by B. to swear in his (A's) favour. - he is interested in the question as in the case above.

Agt. a Master sue for a salary of his Servt. per quod &c. the Servt. shd be called as a witness - The Servt. wd have an interest. or as Lee Manst. said ought to be influenced as to the question. for the recovery of the Master. wd not at all affect the right of the Servt. to sue the same defts. Bak 165. Mod 585. 944. 1054. 3 Wils 16. 1 Root 492.

Compet.ᵗ of Witᵉˢ. — But it is now settled since the case of Bent v Baker 3 T.R. 35. (the magna carta of the law as to this point) that such influence in the questᵒⁿ goes only to the credit of the witᵉˢ, & not to his competᵗ see also. Bur 2455. 1 T.R. 163. 302. 2 ib 496. 3 ib 36. 4 ib 20. 538. 3 ib 603. 7 ib 60, 603.

So in all the examples above given the witnesses are now all admissable

The Rule now is that a witness not disqualified by interest, unless he is interested in the event of the suit, i.e. in a situation to be immediately benefitted or injured by the event of the suit in auc. 1 Peak 144. Phill 36. 1 Rᵒ & Nal 176. Leach 151.

Hence in crimᵉ cases the person injured by the offence is regularly a competent witᵉˢ for the prosecution tho' he has a claim agᵗ the party accused for the civil injury involved in the crime — almost every crime involves a civil injury 4 Bur 2455. 5 T.R. 60. Phill 86. 90.

This rule is indeed qualified by many writers thus "unless he can give in evidᵉ in the civil suit the verdict obtained in the prosᵒⁿ" How to take this qualificᵒⁿ to be altogether useless at L.L. — for take it, there are no cases at L.L. (tho there are some under the St.) in wh this verdict can be given in evidᵉ in the civil suit Peak 146. 456. — see this discussed post. po.

To illustrate the rule, Or an indictmᵗ of A for a battery of B. B is a competent witness for the public, to prove the battery

Or

Also an indictm.t for all crimes except forgery (wch
will be discussed hereaft.) — This is but an interest in the
question — as the record cannot be given in evid.ce
in the civil suit, agst. the deft. — Thus for the
rule has never been doubted — even when interest
in the question what held to exclude, it did not
exclude in some cases. 1 Sid 28. 1 Mo Rep 53. Hardr 331.
1 Roll Abr 683. 2 ib 685.

And upon an indictment for robbery
this witness shd be entitled to restitution of his goods
upon conviction, since by the Eng. Law he is a competent
witness — for his right to the goods does not depend
upon conviction, but the certainty of restitution does.
so this is not deemed an interest in the event. 1 Mo
Rep 50, 51, 116. 144. Leach. 290. 9 Mod. Rep. 30.

So if one is in-
dicted as a cheat, the person swindled is a competent
witness. & for the same reasons. 1 Vent 40. Salk 285. Hardr
358. see contra Salk 283. Stra 1043 but not law now.

So upon
an indictment for perjury the individual injured is a
competent witness. for the Crown 4 Burr 2258. 4 East 581.
Stra 1230. Peak Cas 104. Contra Stra 1104. 1042. Hardr 531.
Salk 283. but not law.

And in case of perjury it is not
material whether witness has or had not a suit pend.g
the judgt obtained agst him by the perjury — that
formerly this was supposed to make a difference
Burr 2255. 4 East 577. 4 Dall. 412. contra 1 Esp. 77. Peak Cas
12.

Also a

Compet.t of Witn.s

and it is said that in a pros.n for perjury under the St of Eliz. the party injured by the offence is a competent witn.s for the crown, altho the St. gives him one half the forfeiture — for it is said that in his action to recover his share of the forfeiture this verdict could not be given in evid.ce — but I think it could be introduced, under the remark above made that in St cases, the record of conviction could be read in evid.ce in civil cases. & in this case the rec.d of conviction is part of the res gestæ — & this opinion is supported by respectable auc. Phill 88 is append but I think his rule wrong & reasoning fallacious. see. Gilb 124. 2 Roll 685. 2 Bac. Ab 889. La Roy. 1229.

Qu. Persons to whom Counties are given by St. for apprehending & prosecuting offenders to conviction, are competent witn.s ag.t prisoner Wills 442. Peak 152 s, 171. 1 Mc Nel 50. 51. 116. 144. 176. 3 East. 455. 4 ib 180. But it will immediately occur, are not these witnesses interested in the event? Undoubtedly they are, for it is the conviction of prisoner that entitles them to the Counties, — this then is a strong exception to the rule; & it is admitted to give effect to the St. wh would be rendered nugatory in a great degree if such evid.ce was not admitted. —

On an indictm.t of a debtor for stealing up a note or bond — as on pretence of having paid it, the debtor was holden to be a competent witness. Stra 95

So also on a public pros.n under the St. of Usury, the debtor is a competent to prove the whole case.

whether

whether he has paid up the whole usurious note or not. the rule was formerly otherwise - he cd not give evid.ce that he had paid up the note. 4 Burr 2251. 2 St. R. 496. 7 T. R. 60. 1 Caines 68. 5 Mass. Rep. 53. 7 T. R. 601. 2 Phill. 34 n.a. 39. 40 n.a.

But a Bar.r upon a penal St. who is entitled to a part of the penalty recovered is not a compet.t witness on the part of the pros.r - for he is entitled to a part of the avails of the judg.t wh is to be recovered - & so interested in the event Stra. 915. 1 Esp. 95. Peak C. 152 n. see contra Gilb. 132. 3 Mod. 114

In the single case of a pub. pros.r for Forgery it has been always holden that the person by whom the instrum.t forged, purports to have been made is incompetent to testify for the public, provided the instrum.t supposing it to have been genuine wd subject him to a suit or deprive him of a right - case of the forgery of a note of hand or of receipt &c. - This rule has prevailed from the earliest period of history to the present time 6 Salk 172. Stra. 926. Leach. Cr. Cas. 10. 29. 255. 2 East. P. C. 985. 2 M. R. 57. Peak 149. S. 165. 9. Phill 58. 90. Wardr 331.

And his incompetency extends to every fact wh wd conduce to prove the forgery - & not merely to proving the hand writing, unless he is released by him in whose favour the forged instrum.t is drawn. Case of Dr. Dodd, who was executed for forging an instr.t in the name of Ld Chesterfield - Chesterfield was not admitted as evid.ce till released.

But as to collateral facts not conducive to prove the event - as that he is the

main

Compet. of Witness } man whose name is forged he may testify. 2 East. 996. 7. 1 McNal 143. Leach. C. Cas. 469. Phill 89.

Upon what principles this rule has been established no man can tell — it is an exception to all analogies & the decisions in the books are all uniform & it is now so strongly supported in Eng. by precedents, tho without analogy or principle, that no judge can be found in Eng. who has the hardihood to overturn it.

The rule does not hold however, when the party whose name is forged do not be personaly affected by it supposing the instr. genuine; hence the Cashier of a bank, a compet. wit. to prove the signature purporting to be his, is a forgery. — So of an officer of any corporation. for he acts for the Corporation. Leach. C. Cas. 350. 1 McNal 120. 2 128. Phill 88. Peak. 169.

So also when a banker had paid a forged draft. & charged it in his books — & afterwards struck the same out of his acct. — thus abandoning all claim to recover the money. — he was holden to be a compet. Witness. 2 N. R. 269. 2 East. P. Cr. 1000. Leach. Cr. Cas. 57. Peak 169.

The rule that if the person whose name is forged wd. be affected by it, if the instr. was genuine, is an incompet. wit. has been extended so as to render all persons incompetent who are any way interested in the event. As an indict. for forg. a will the Exr. of a subsequent will was held incompet. to testify — & so of a Legatee even Peak. 169. Hardr 331. 3 Salk 154. But this rule was adopted

D

by Ld Mansfield 4 Burr. 2254.

But the person whose name has been forged may be rendered competent in any case by a release from him in whose favour the instr. purports to have been made. — Dr Leach's case. Phill 98. Peak 169 n.

But in Conn. the Gen.l Rule obtains, the party whose name is forged has lately been examined by the Sup. Court. — so that here — the case of forgery is put upon the same ground as every other case of crimes. — The same thing has been settled in Penn. & Mass. & I think positively so in N York. that the precise point did not arise. 1 Mass R. 7. 3 ib 82. 1 Dall 110. 2 ib 239. 2 Nott. R. Days ca. 96 n. 4 Johns 296. 302.3.

As to interest in the event of the suit. The Rule is, That the person interested in the event of a suit at Law is offered as a witness in that suit he is regularly incompetent to testify. — This rule as is observed above has been varied some by St. as those agt perjury — & giving bounties to the Witness. 2 T R 496. 3 ib 86. 7 ib 600. 608. 4 Burr 2254-5. Peak 144. & 146. 164. 170. Phill 46. 49. 50.

By an interest in the event is meant a certain benefit or disadvantage to accrue to the witness from the result of the suit. This however is a very gen.l definition — I think the following is more complete, — He is interested in the event, only, when on the one hand he will acquire some certain immediate right, or exemption from immediate loss or liability, by a determination in favour of the

Compet.ᵉ of Witn.ᵉˢ } the party by whom he is offered, or on the other hand will acquire some certain immediate loss or liability by a determination in favour of the opposite party. 3 BR. 32. 4 ib 20. 2 Johns. Cas. 236. 4 Johns. R. 302. 5 ib 257.

As a gen.ᵉ rule tho' the criterion is not universal — the question whether the witn.ᵉ is interested in the event, depends upon the question whether the record of the present suit in wh he is offered could be offered in evid.ᵉ for or ag.ᵗ him in a subseq.ᵗ suit in wh he is a party. — there are exceptions to the rule though it is nearly universal. 3 BR. 32. 38. 86. 7 ib 62. 4 East 58. 4 Johns. 230. 5 ib 144. 2 Johns. Cas. 236. but that it is not the only criterion see 4 BR 19. 5 ib 667. 2 East. 561. 2 Phill 51. 52.

This being the gen.ᵉ criterion it follows as a gen.ᵉ rule that if the verdict & wh he was a witn.ᵉ is admissable in evid.ᵉ in a subseq.ᵗ suit & wh he is a party — he cannot be examined 4 BR 19. 2 East. 561. et ib anc.

As to the first branch of the distinction viz that witn.ᵉ is incompetent provided the record is evid.ᵉ for him in a subseq.ᵗ suit. eg. in a suit by claiming a right of common by custom. B claiming under the same custom is not a compet.ᵗ witn.ᵉ for A — for a verdict find.ᵍ a custom is evid.ᵉ not only between the parties to it but between all persons whatever claiming under that custom 1 BR 302. 2 ib 92 La Ray 731. Bl. R. 253. 2 Johns. 170. 2 Phill 445.

So also if the party offered as a witn.ᵉ wᵈ be liable for the costs of suit on either side — he wᵈ be incompetent. so that if in

in favour of that side — as if an infr. is sued by his
proctein ami or his Guardian is incompet. with. for Infr.
2 Stra 548. 1026. Gilb 109. 1 Eq. Cas. 72. 10 R. 491. 1 Wils 130.

The same rule holds as to him who agrees to indemnify
the party introducing him. agst. the costs. — for the
record is evid. to shew that costs have been recovered

So the Surety for costs. of either party, as have given
bond for the prosn. or in Error. bond upon a writ of
attachment — for the record is evid. ag. the bondsman
or suggestion in an act. to recover the costs. Stra 575.
129. 11. Johns. 57.

For the same reason defts bail cannot testify for defts. as he becomes liable on failure of defts.
but the bail may be restored to competency, on motion
by defts to withdraw the bail & substitute other bail
15 R 164. 8 Johns 407.

So in an act. agst. the shff for breach
or neglect of duty of his deputy. the depn. is no evid.
for the rec. is evid. ag. him in an act. brot. by the
shff i.e. it is evid. as far as to shew that the shff has
been subjected for his dep. & of the amt to wh subjected
but a release by the shff of all claims agst. the dep.
will render him competent. La Ray 1411. Stra 650. 3
Com. Dig. 523. Bak. 165.

So in an act. agst. the master for
mis conduct of his Serv. — the Serv. is incompetent. unless
released by master of all claims, — for the Master if subjected
has a right of act. ag. his serv. & this rec. is evid. as above

Compet.ᵗ of Witn.ᵉˢ above 4 T.R 569. La Ray 1009. 1 Camp 6. 451. 3 ib 516. Peak. Cas. 53. 84. 1 Esp. 339. — That a release restores the competency see Stra 1063. 1 Esp 334. Peak Cas 53. 83.

Cases on this point might be multiplied to a great extent & give but one more. On an act.ⁿ of Policy of Ins.ᵉ for loss by lunacy of master. — the master is incompetent to testify for Ins.ᵒʳˢ unless they have released him — for if the Ins.ᵒʳˢ are subjected, they have an action ag.ᵗ him & this record is evid.ᵉ of the lunacy & of the amᵗ to which the Ins.ᵒʳˢ were subjected 1 Esp. R. 339. Peak. C. 166. Phill 47. See analogies 1 Atk 306. 1 Camp 6 406. Stra 575. —

On the other hand, if a witn.ᵉˢ for Deff.ᵗ who by subjecting the deft exonerates himself of any liability, he is incompetent to testify for Deff.ᵗ for it makes no diff.ᵉ whether he is to be subjected by a defeat on one side or exonerated by a recovery on the other. — Case of an Intest.ᵗ suing by Guardian, the Guard.ᵐ is no evid.ᵉ for the next Intest.ᵗ — for by a recovery by the Intest.ᵗ he will be exonerated from his liability to costs. Peak, Cas. 84. Hardw. 202. Stra. 506. 1026 2 Mod 444. 4 ib 658.

Upon this joint.ᵉ a Grantor who has conveyed land with cov.ᵗˢ of warranty.ᵉ & seisin, is inadmissable to impeach Grantees title, in Ejectm.ᵗ 2 Roll 685, 3 Day 439. 2 Johns. 394. 6 ib 528. Peak 170.

Same rule holds as to a Lessor, who has leased with cov.ᵗ of w.ᵗ & seisin in an act.ⁿ of ejectm.ᵉ ag.ᵗ Lessee. Lessor incontest.ᵗ with.ᵉ whether the cov.ᵗˢ were performed, or in fact a forfeiture

the word "demisi" 4 Esp 154. Phill 74.

So also a vendor of a chattel is a competent in a suit agt his vendee in wh the title comes in question, — for on every sale of a chattel there is an implied warr. by vendor that he has title & Johns 5. Phill 74 n.

But Grantor — Vendor or Lessor without cont. of warr. & not sworn or implead is admissable to testify in support of the title — for now witness is disinterested as vendee has no claim agt him, Stra 445. Peak 170.

So also, when wit. is competent only agt those claiming under himself he is a competent witness as agt all parties not claiming under himself — as in cases of fraudulent sales. Peh have it at the risk of vendee whether vendor has any title or not. — So if vendee is evicted has no claim agt vendor. the witness. 4 Mass. 441. 2 Binny 95. 108. 500.

So the inhabitants of a town or parish liable to be rated for the support of the poor — if they are not actually rated they are competent witness for the town or parish, as in a case of settlement — for their interest is contingent as they may not be rated. If actually rated, in Eng they are incompetent. 4 T.R. 17. 5 id 157. 2 East 560. Peak 103. 4.

In Conn. the members of local corporations are allowed to testify in all cases where the Corporation is a party — this is from necessity as the inhabitants of one town (for instance) are supposed to

Competency of Witnesses 3

to know nothing of the concerns of their neighbouring towns.

And by the Eng rule as well as our own the inhabitants are allowed to testify in a qui tam act to recover a penalty tho' the penalty if recovered will go to the support of the poor of their town or parish. — This is from the remote contingency & the smallness of the sum to be recovered when considered with reference to the [illegible] rates.

It is a

sui generis, that a third person a mere stranger to the suit is not allowed to testify in ejectment. that he himself & not the deft is in possession but it is correct on principle for he has an immediate interest in the event, as he will be turned out of possession on a recovery by the writ of habere in possessionem — and tho the action ought not to be sustained, still this witness shall not give his evidence to overthrow it. — other evidence of his possession must be introduced 1 Johns. Cas. 175. 12 Johns R. 246.-

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